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Recent Decisions

Court of Appeals of Maryland

I. AGENCY AND PARTNERSHIPS

A. Maryland's Uniform Partnership Act Does Not Require the Forced Liquidation of Assets to Determine Business Value in Winding Up a Dissolved Partnership

In *Creel v. Lilly*,[1] a unanimous Court of Appeals held that a partnership's dissolution by a partner's death does not entitle a decedent's estate to the right to demand the forced liquidation of all partnership assets.[2] The court correctly determined that forced liquidation is a harsh and disruptive measure,[3] especially when reasonable alternative methods are available to determine the true value of a partnership business.[4] In reaching its decision, the court relied on the contractual construction of the partnership agreement, legislative interpretation, and public policy.[5] In resolving the forced liquidation issue, the court also gave an early endorsement to the newly enacted Revised Uniform Partnership Act (RUPA),[6] adopted in Maryland to address some of the deficiencies in the existing Uniform Partnership Act (UPA).[7] The *Creel* court properly relied on the policy justifications behind RUPA and the court's equitable power in crafting an exception to UPA's traditional forced liquidation interpretation,

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1. 354 Md. 77, 729 A.2d 385 (1999).

2. *Id.* at 107, 729 A.2d at 401-02.

3. *See id.* at 82, 729 A.2d at 388 ("Winding up is not always synonymous with liquidation, which can be a harsh, drastic, and often unnecessary course of action.").

4. *See id.* (stating an alternative method, utilized by the partners in *Creel*, by which the surviving partners pay the deceased partner's estate its proportionate share of the business's value).

5. *See id.* at 99-104, 729 A.2d at 397-400 (finding that the language of the partnership agreement did not require the partnership's liquidation or the sale of its assets, and that sound public policy necessitated the partnership's continuity without liquidation).

6. *See id.* at 107, 729 A.2d at 401-02 (finding that Maryland's Uniform Partnership Act, in light of the recent adoption of RUPA, does not support the requirement to liquidate all partnership assets). Maryland's RUPA is codified at MD. CODE ANN., CORPS. & ASS'NS tit. 9A (1999), and is slated to take effect on January 1, 2003. *Creel*, 354 Md. at 81, 729 A.2d at 387.

7. MD. CODE ANN., CORPS. & ASS'NS tit. 9 (1999); *see Creel*, 354 Md. at 90-92, 729 A.2d at 393 (comparing UPA with RUPA and describing the latter as a flexible and innovative alternative to rectify UPA's rigidity and deficiency in addressing modern business concerns).

thereby promoting efficiency through the continued stability of partnerships.

1. The Case.—On September 20, 1994, Joseph Creel, Arnold Lilly, and Roy Altizer formed a general partnership, "Joe's Racing," to engage in the selling of NASCAR memorabilia.[8] The three men prepared their partnership agreement without the assistance of counsel.[9] The agreement covered a variety of issues, including the purpose, location, operations, and termination process of the partnership.[10] The termination provisions in paragraph 7 of the agreement provided that, at the termination of the partnership, a full and accurate inventory of the business's assets would be prepared and the liabilities and profits of the enterprise would be ascertained.[11] The parties further provided that the debts and profits of the partnership would be distributed according to the percentage shares stipulated in the partnership agreement.[12] In the event of a partner's death, paragraph 7(d) provided that, "[u]pon the death or illness of a partner, his share will go to his estate. If his estate wishes to sell his interest, they must offer it to the remaining partners first."[13]

The three-person partnership operated a retail store in the St. Charles Towne Center Mall in Waldorf, Maryland.[14] Approximately nine months into the partnership, Joseph Creel died.[15] Anne Creel, Joseph Creel's wife, became the personal representative of his estate.[16] Since the death of a co-partner dissolves the partnership in the absence of a continuation agreement,[17]

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8. *Creel*, 354 Md. at 82, 729 A.2d at 388.

9. *Id.*

10. *Id.*

11. *Id.* at 83, 729 A.2d at 388.

12. *Id.* At the time the partnership agreement was completed, Joseph Creel held a 28% share, while Lilly, Altizer, and a fourth person, Joseph Cudmore, each held 24%. *Id.* at 101 n.6, 729 A.2d at 398 n.6. Since Cudmore did not take part in the partnership, the trial court added Cudmore's share to Creel's, entitling his estate to 52% of the partnership interest. *Id.*

13. *Id.* at 83, 729 A.2d at 388 (internal quotation marks omitted) (quoting paragraph 7(d) of the partnership agreement).

14. *Id.*

15. *Id.*, 729 A.2d at 389.

16. *Id.*

17. *Id.* at 84 n.3, 729 A.2d at 389 n.3 (referring to MD. CODE ANN., CORPS & ASS'NS § 9-602(4) (1999), which states that the death of any partner dissolves a partnership); *see also* UPA § 9-101(e) (defining dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business").

Lilly and Altizer proceeded to wind up and terminate the partnership.[18]

To facilitate the winding up of Joe's Racing, the surviving partners requested that Mrs. Creel authorize the release of partnership funds.[19] When Mrs. Creel refused, Lilly and Altizer, acting as representatives of Joe's Racing, commenced the underlying lawsuit in district court.[20] Upon motion for a jury trial by Mrs. Creel, the case moved to the circuit court.[21] The circuit court determined that the surviving partners took reasonable steps in winding up the partnership and did not breach their fiduciary duty to the Creel estate.[22] The court specifically found the inventory of all merchandise, the retention of an accountant to value the inventoried assets, and the invitation extended to Mrs. Creel to review the records, as reasonable steps taken to wind up the business.[23] Furthermore, the court accepted the prepared valuation of the business and used it to allot the proportionate shares between the estate and the surviving partners.[24]

The circuit court rejected Mrs. Creel's assertion that the law of partnerships obligated the surviving partners to liquidate all of the partnership's assets in order to wind up the business.[25] The Court of Special Appeals affirmed that judgment, holding that UPA does not always require the forced liquidation of all partnership assets to finalize the winding up process.[26] The Court of Appeals of Maryland

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18. *Creel*, 354 Md. at 84, 729 A.2d at 389 (citing UPA § 9-601, which provides that "[o]n dissolution, the partnership is not terminated, but continues until the winding up of partnership affairs is completed"). "Winding up" is a process by which the assets and liabilities of a dissolved partnership are determined to settle claims of creditors and apportion the profits and losses among the partners and the estate, before the venture is terminated. *See* Tawes v. Thompson Trailer Corp., 209 Md. 490, 501-02, 121 A.2d 850, 856 (1956). Therefore, unless the partnership agreement provides for continuation, or the estate consents to the continuation of the business, the surviving partners are required to wind up and terminate the partnership. *Creel*, 354 Md. at 84, 729 A.2d at 389.

19. *Creel*, 354 Md. at 84, 729 A.2d at 389. Joseph Creel had changed the signatory authority on the partnership's account, making himself the sole signatory for the release of funds. *Id.* at 83, 729 A.2d at 389. When the lawsuit started, the bank filed an interpleader motion and was dismissed from the case upon deposit of the partnership funds with the court. *Id.* at 84, 729 A.2d at 389 (quoting the unreported opinion of the Court of Special Appeals).

20. *Id.*

21. *Id.*

22. *Id.* at 85, 729 A.2d at 390.

23. *Id.* at 85-86, 729 A.2d at 390. Mrs. Creel declined the invitation to review the books and did not retain her own accountant to review the valuation done by Lilly and Altizer. *Id.*

24. *Id.* at 86, 101 n.6, 729 A.2d at 390, 398 n.6. The circuit court assigned 52% to the Creel estate and 24% each to Lilly and Altizer. *Id.*

25. *Id.*

26. *Id.*

granted certiorari to determine whether Maryland's UPA "permits the estate of a deceased partner to demand liquidation of partnership assets in order to arrive at the true value of the business."[27]

2. *Legal Background.—Creel* presented the Court of Appeals with a case of first impression in determining whether, in the absence of an agreement to the contrary, the estate of a deceased partner may demand the forced liquidation of all partnership assets.[28]

a. The Partnership Agreement as the Primary Source of Law.—In determining partnership rights and duties, courts first resort to an examination of the partnership agreement.[29] One of the distinctive features of partnership law is the extent to which partners are able to avoid default rules by incorporating specific terms into the contract that governs their relationship.[30] The agreement, as "the law of the partnership,"[31] allows partners to write their own terms concerning the future of the partnership in the event of a partner's death.[32] Thus, in addressing the consequences of a partner's death, the partnership agreement may provide for the uninterrupted continuation of the business after payment of the estate's proportionate share.[33]

b. The Default Rules of Partnership Law: UPA.—In the absence of a specific agreement regarding the consequences of a partner's death, a court, confronted with the competing demands of an estate

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27. *Id.* at 80, 86, 729 A.2d at 387, 390. Mrs. Creel's appeal was predicated on two premises. The primary issue was the demand for liquidation of all partnership assets, which is the focus of this Note. *Id.* at 80, 729 A.2d at 387. The second issue involved a damages claim for the unauthorized continued use of Joe's Racing's assets in setting up a new partnership. *Id.* at 82, 729 A.2d at 388. The court determined that the surviving partners formed the new partnership, "Good Ole Boys Racing," only after they properly wound up and terminated Joe's Racing. *Id.*; *see also id.* at 107-10, 729 A.2d at 402-03. Since the issue of damages for continued use is not relevant to the main thesis of this Note, it will not be addressed further.

28. *See id.* at 93, 729 A.2d at 394.

29. *See* MD. CODE ANN., CORPS. & ASS'NS § 9A-103(a) (1999) (providing that "relations among the partners and between the partners and the partnership are governed by the partnership agreement"); *see also* Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 2 (1993) (stating that, with rare exceptions, partners are permitted to govern the partnership relationship by agreement).

30. *See* ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 5, at 43 (1968) (stating that while partnerships are governed by common law and statute, such mandates can be overridden by the parties themselves).

31. Seattle-First Nat'l Bank v. Marshall, 641 P.2d 1194, 1199 (Wash. Ct. App. 1982) (quoting BROMBERG, *supra* note 30, § 5, at 43).

32. *See id.* at 1198-99 (discussing various contract provisions that may be applied to apportion assets and liabilities upon the death of a partner).

33. Gerding v. Baier, 143 Md. 520, 524, 122 A. 675, 677 (1923).

seeking the liquidation of partnership assets and the surviving partners' wishes to avoid liquidation, resorts to the default rules of partnership law.[34]

Maryland enacted UPA in 1916.[35] UPA governs partnership issues in cases where a partnership lacks a written agreement, the agreement is silent on a given issue, or the agreement contains a provision that is contrary to law.[36] UPA's breakup provisions provide that a partnership is automatically dissolved upon the death of a partner.[37] Unless the agreement provides for a continuation or the deceased partner's estate consents to the entity's continuation, the partnership must be wound up and terminated.[38] Winding up is the process used to determine the assets and liabilities of a dissolved partnership, to settle the claims of creditors, and to apportion the profits and losses among the partners and the estate.[39]

A court resolving a winding-up dispute under UPA needs to determine whether the surviving partners are required to liquidate all partnership assets to wind up the partnership.[40] Different jurisdictions have resolved the issue with varying results. The experiences of other jurisdictions is especially relevant because, in *Creel*, the issue was one of first impression for Maryland courts.[41]

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34. *See id.* (stating that UPA shall not be construed so as to impair the obligations of any contractual arrangement); *see also* Weidner & Larson, *supra* note 29, at 23 (stating that default rules apply only in the absence of a partnership agreement to the contrary or unless the rights of third parties are affected by giving effect to the agreement).

35. MD. CODE ANN., CORPS. & ASS'NS tit. 9 (1999). UPA, which was the applicable default rule to govern the partnership in *Creel*, is slated for repeal, effective December 31, 2002. *See id.* § 9-1001(b). In 1998, Maryland enacted RUPA to replace UPA. MD. CODE ANN., CORPS. & ASS'NS tit. 9A (1999).

36. *See, e.g.*, UPA §§ 9-401, 9-608, 9-611 & 9-613 (providing that the default UPA rules governing the rights and duties of partnership relations would apply, "subject to any agreement" between the partners, "unless otherwise agreed," or "subject to any agreement to the contrary").

37. *See* UPA § 9-602(4) (listing death as one of the grounds for partnership dissolution).

38. Gianakos v. Magiros, 238 Md. 178, 183, 208 A.2d 718, 721 (1965); *see also* UPA § 9-601.

39. Tawes v. Thompson Trailer Corp., 209 Md. 490, 501-02, 121 A.2d 850, 856 (1956); *see also* UPA § 9-609(a) ("When dissolution is caused . . . each partner . . . may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners."); *id.* § 9-611 (enumerating detailed rules for the distribution of partnership assets and liabilities in the winding-up process).

40. *See* Cutler v. Cutler, 165 B.R. 275, 278 (Bankr. D. Ariz. 1994) ("The winding up process does not necessarily mean that the assets of the partnership must be liquidated, although that is one option."). Courts in other jurisdictions have found "[t]he question of a proper and equitable dissolution [to be] perplexing." Dow v. Beals, 268 N.Y.S. 425, 427 (N.Y. App. Div. 1933).

41. *See Creel*, 354 Md. at 93, 729 A.2d at 394.

(1) The Traditional UPA Interpretation.—Traditionally, courts and some commentators adopted the position that, under UPA, once a partnership is dissolved by death, the estate may compel the liquidation of all partnership assets.[42]

In *Gianakos v. Magiros*,[43] the Court of Appeals of Maryland held that UPA breakup provisions impose a duty to liquidate partnership assets, unless the surviving partners secured the estate's consent to continue the partnership.[44] *Gianakos* involved a unique set of facts in which the surviving partner, Thomas Magiros, was also a representative of the estate as the son of the deceased partner.[45] In a liquidation suit brought by the executor of the deceased partner's wife, the court held that the dual hats Magiros wore properly allowed him to give consent (as a representative of his father's estate) to himself (as a surviving partner) to continue the partnership without liquidation.[46]

In *Dreifuerst v. Dreifuerst*,[47] a winding-up dispute between siblings who operated a feed mill partnership, a Wisconsin appellate court addressed whether, in the absence of a written agreement to the contrary, a partner can force the sale of partnership assets upon dissolution.[48] The court equated the winding-up process with liquidation and interpreted UPA as entitling a departing partner with the right to liquidate the business and secure his share of the surplus paid in cash.[49] The *Dreifuerst* court acknowledged that liquidation may cause economic hardships to the remaining partners.[50] Nonetheless, the court rationalized its holding by stating that a liquidation sale is the best means of determining the fair market value of the partner-

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42. *See, e.g.*, Alan Bromberg, *Partnership Dissolution: Causes, Consequences, and Cures*, 43 TEX. L. REV. 631, 632 (1965) (discussing the meaning attached to, and the consequences of, partnership dissolution under UPA). Professor Bromberg states:

> We shall use "winding up" and "liquidation" synonymously. But note that there may be a winding up of the *affairs* of a partnership without liquidation of the *business* as a going concern if the business is continued by some of the partners . . . with appropriate payments to settle the accounts of the old firm.

Id.

43. 238 Md. 178, 208 A.2d 718 (1965).

44. *Id.* at 183, 208 A.2d at 721.

45. *Id.* at 181, 208 A.2d at 719-20.

46. *Id.* at 184, 208 A.2d at 721.

47. 280 N.W.2d 335 (Wis. Ct. App. 1979).

48. *Id.* at 336, 337.

49. *See id.* at 338-39. The court equated winding up with liquidation, finding that "[w]inding-up is often called liquidation and involves reducing the assets to cash to pay creditors and distribute to partners the value of their respective interests." *Id.* (citation omitted).

50. *Id.* at 339.

ship.[51] Furthermore, the court concluded that "these hardships can be avoided by the use of partnership agreements."[52]

(2) Judicial Crafting of Alternatives to the Traditional Interpretation of UPA.—Due to perceptions of the liquidation remedy as harsh and destructive,[53] different jurisdictions attempted to avoid the traditional UPA interpretation by seeking alternative resolutions.[54] Some courts endorsed alternative methods for winding up a dissolved partnership, such as the distribution of assets in kind,[55] or allowing a buy-out option for the surviving partners.[56]

The buy-out option provided courts with an equitable alternative to the traditional UPA interpretation. In *Dow v. Beals*,[57] for example, a New York court was confronted with the task of adjudicating a liquidation demand by a co-partner in a dissolved partnership.[58] The court, acknowledging the difficulty of an equitable mode of dissolution, ruled that there should be no forced sale of the partnership's assets, provided that the departing partner was paid the cash equivalent of his interest in the partnership.[59] In so holding, the court relied on its remedial and equitable powers to dispense with the demand for a judicial sale.[60]

Similarly, in *Goergen v. Nebrich*,[61] a New York trial court construed a partnership agreement as not requiring the forced liquidation of assets upon a partner's death.[62] *Goergen* involved a dissolution in which the legal representative of the deceased partner sought to force a public sale of the partnership assets to determine the estate's pro-

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51. *Id.*

52. *Id.*

53. *See* Bromberg, *supra* note 42, at 647 ("[T]he liquidation right will be injurious to the business in many, perhaps in most, cases. One authority has described it as 'ruinous.'" (citing 2 LINDLEY, PARTNERSHIP *591 (5th ed. 1889))).

54. *See* Weidner & Larson, *supra* note 29, at 4 (describing the struggle courts faced in reaching an equitable result in refusing dissolution, even if the statute seemed to require it).

55. *See, e.g.*, Nicholes v. Hunt, 541 P.2d 820, 828-29 (Or. 1975) (exercising its equity jurisdiction and ordering the in-kind distribution of partnership assets rather than liquidation); Rinke v. Rinke, 48 N.W.2d 201, 207 (Mich. 1951) (same); Kelley v. Shay, 55 A. 925, 927 (Pa. 1903) (same).

56. *See infra* notes 57-74 (discussing cases from other jurisdictions experimenting with the buy-out alternative to liquidation).

57. 268 N.Y.S. 425 (N.Y. App. Div. 1933).

58. *Id.* at 426.

59. *Id.* at 427.

60. *Id.*

61. 174 N.Y.S.2d 366 (N.Y. Sup. Ct. 1958).

62. *Id.* at 369.

portionate share.[63] The court acknowledged that the estate is entitled to a complete accounting, as well as its share of the assets.[64] However, the court found no reason to compel a public sale in order to arrive at this result.[65] The court reasoned that the estate would still be protected by alternative valuation and appraisal methods and concluded that "it would be *inequitable* and *unfair* to the surviving partner to have a public sale."[66]

Fortugno v. Hudson Manure Co.[67] involved a family partnership, dissolved due to sibling acrimony.[68] One of the brothers seeking dissolution suggested an alternative to the outright liquidation of all partnership assets, offering to settle for a complete accounting and proportionate payment of his share.[69] Based on its equitable powers, the New Jersey appellate court held that since liquidation would destroy the value of the business, the partnership could be wound up using the buy-out option suggested by the departing partner.[70]

Finally, in *Gregg v. Bernards*,[71] the Oregon Supreme Court affirmed a trial court's decision to award title to a racehorse, the principal asset of a two-person partnership, to one of the partners in the dissolved business.[72] The court prevented the public sale of the horse, allowing the plaintiff to buy out the other partner's proportionate share.[73] The court affirmed the trial court's exercise of equitable power in arriving at this result.[74]

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63. *Id.*

64. *Id.*

65. *See id.* ("The legal representative of the deceased partner will be fully protected by a disinterested appraisal of the assets of the former partnership and by receiving decedent's share on the purchase of the deceased partner's assets by the surviving partner at the appraisal price.").

66. *Id.*

67. 144 A.2d 207 (N.J. Super. Ct. App. Div. 1958).

68. *Id.* at 210.

69. *Id.* at 210-11. The facts in *Fortugno* involved partnership property consisting of stocks in different corporations. *Id.* at 210. After holding that the corporations were assets of the partnership, the court found that a mandatory in-kind distribution of corporate stock would be inequitable, as such action would force a minority stockholder to be locked in a closely held corporation where the other partners held enough stock to maintain a controlling majority in the corporations. *Id.* at 218. The court then narrowed the available options as between the liquidation of all partnership assets or the buy-out alternative, opting to adopt the latter. *Id.* at 219.

70. *Id.* at 219.

71. 443 P.2d 166 (Or. 1968) (per curiam).

72. *Id.* at 167.

73. *Id.*

74. *Id.*

The examples reflected in these jurisdictions demonstrate that persuasive judicial authority evolved and modified UPA's traditional liquidation-on-dissolution remedy.

c. The Default Rules of Partnership Law: RUPA.—RUPA,[75] which will replace UPA in Maryland in 2003,[76] is another source of law impacting the judicial resolution of the forced liquidation issue.[77] RUPA precludes the estate of a deceased partner from using the liquidation right as a threat to the continued stability of a partnership.[78] Unlike UPA, under which the death of a partner automatically dissolves the partnership,[79] RUPA treats death as a cause for "dissociation" of a partner from the entity and not as an immediate cause for dissolution.[80] The dissociation of a partner by death gives the remaining partners the option of either buying out the deceased partner's share or winding up and terminating the partnership altogether.[81] The only duties of the remaining partners are to pay the reasonable proportionate share to the estate[82] and to actively choose to exercise one of RUPA's alternative options.[83] Therefore, under RUPA, surviving partners who are ready and willing to pay the reasonable share of a decedent's interest will not be forced to dissolve or liquidate the business at the whim of the estate.[84]

d. The Role of Equity Jurisdiction.—As demonstrated in the crafting of judicial alternatives to the traditional UPA interpretation, courts expressly have invoked their equity jurisdiction to avoid the forced liquidation remedy.[85] Furthermore, both UPA and RUPA

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75. MD. CODE ANN., CORPS. & ASS'NS tit. 9A (1999).

76. *Id.* § 9A-1204.

77. *See id.* § 9A-103.

78. *See Creel*, 354 Md. at 90-91, 729 A.2d at 393.

79. *See* MD. CODE ANN., CORPS. & ASS'NS § 9-602(4) (1999).

80. *See* RUPA § 9A-601(7)(i).

81. *Id.* § 9A-603.

82. *See id.* § 9A-701(a).

83. *See Creel*, 354 Md. at 90, 729 A.2d at 392-93 (finding that "the surviving partners must still actively choose to exercise the option, as 'continuation is not automatic as with a corporation.'" (citations omitted)).

84. *See id.*

85. *See, e.g.*, Gelphman v. Gelphman, 50 P.2d 933, 936 (Kan. 1935) (affirming the trial court's decision that ordered the in-kind distribution of partnership property, rather than a liquidation sale, through the court's equity jurisdiction); Kelley v. Shay, 55 A. 925, 927 (Pa. 1903) (ordering the division of partnership stock in-kind rather than the liquidation remedy, on equitable grounds). The *Kelley* court stated:

> Equity and good conscience . . . require that in the present case the stock should be divided in kind, rather than that it should be sold and the proceeds divided. *The rule is generally the other way,* because the fairest results are in most cases

mandate courts to use supplemental principles of equity to fill gaps in the default rules, thereby providing an additional source of decisional law at a court's disposal.[86]

3. The Court's Reasoning.—In *Creel v. Lilly*, the Court of Appeals held that upon dissolution of a partnership by a partner's death, reasonable alternative methods may be used to determine the true value of the business, without liquidating all partnership assets.[87] The court reached this result based on a contractual construction of the partnership agreement,[88] analysis of case law from other jurisdictions interpreting UPA's default rules,[89] and public policy grounds.[90]

The issue in *Creel*, as stated by the court, was "whether Maryland's Uniform Partnership Act . . . permits the estate of a deceased partner to demand the liquidation of partnership assets in order to arrive at the true value of the business."[91] Judge Chasanow, writing for a unanimous court, began by pointing out that clarification of the liquidation issue would implicate other areas of partnership law, and, therefore, the court would analyze a variety of sources of law to support its holding.[92]

a. Contractual Construction of the Partnership Agreement.—The court began its analysis by reviewing the law of partnership[93] and examining whether the partnership agreement in *Creel* provided an answer to the forced liquidation issue.[94] From the outset, the court acknowledged that the partnership agreement, though unclear, seemed to provide an alternative method of winding up the business without necessitating a forced liquidation.[95] The court focused on the

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> reached by a sale. But where, as here, the reason fails, the rule must be honored in the breach, rather than in the observance.

Id. (emphasis added).

86. *See* MD. CODE ANN., CORPS. & ASS'NS § 9-701 (1999) (providing that "[i]n any case not provided for in [Title 9], the rules of law and equity . . . shall govern"); *see also* RUPA § 9A-104(a) (providing that "[u]nless displaced by particular provisions of [Title 9A], the principles of law and equity supplement this title").

87. *Creel*, 354 Md. at 81-82, 729 A.2d at 388.

88. *Id.* at 99-103, 729 A.2d at 397-400.

89. *Id.* at 93-98, 729 A.2d at 394-97.

90. *Id.* at 104, 729 A.2d at 400.

91. *Id.* at 80, 729 A.2d at 387.

92. *Id.* at 81, 729 A.2d at 388.

93. *Id.* at 87-92, 729 A.2d at 390-93.

94. *Id.* at 99, 729 A.2d at 397. The court reiterated that the partnership agreement is the primary source of law in determining partnership rights and duties. *Id.* at 99-100, 729 A.2d at 397-98 (citing Seattle-First Nat'l Bank v. Marshall, 641 P.2d 1194, 1199 (Wash. Ct. App. 1982)).

95. *Id.* at 81, 729 A.2d at 387.

"termination" paragraph of the agreement as the provision that could best determine the partners' intent.[96]

The court construed paragraph 7(a) as outlining the procedural steps to be followed in properly winding up the partnership upon dissolution.[97] Based on this premise, the court determined that the surviving partners had followed these procedural steps.[98] The court pointed to the inventory and the accounting conducted by the surviving partners as implementations of the partnership agreement.[99] The court further noted that the partnership agreement did not expressly mandate the liquidation of partnership assets as a prerequisite to the winding-up process.[100] The court concluded that it would be reasonable to believe that the partners had not intended liquidation to be the only available method to ascertain the true value of the partnership.[101]

The court then turned its discussion to paragraph 7(d) of the agreement.[102] This section obligated the estate of a deceased partner to first offer the inherited shares to the surviving partners before attempting to sell the shares elsewhere.[103] The court construed this clause as an attempted buy-out option in favor of the surviving partners, aimed at the continuation of the partnership.[104] Based on its cumulative reading of paragraph 7(a) and (d), the court concluded that the partnership agreement could be read as not mandating the liquidation of all partnership assets, but rather as offering a buy-out option in favor of the surviving partners.[105]

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96. *Id.* at 100, 729 A.2d at 398. Paragraph 7 of the partnership agreement, entitled "TERMINATION," provides, in part, "[t]hat, at the termination of this partnership a full and accurate inventory shall be prepared, and the assets, liabilities, and income, both in gross and net, shall be ascertained: the remaining debts or profits will be distributed according to the percentages shown above." *Id.* (internal quotation marks omitted) (quoting paragraph 7 of the partnership agreement).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 101, 729 A.2d at 398.

102. *Id.* at 101-02, 729 A.2d at 398-99. Paragraph 7(d) of the partnership agreement stipulated that "[u]pon the death or illness of a partner, his share will go to his estate. If his estate wishes to sell his interest, they must offer it to the remaining partners first." *Id.* at 100, 729 A.2d at 398 (internal quotation marks omitted) (quoting paragraph 7(d) of the partnership agreement).

103. *Id.* at 102, 729 A.2d at 399.

104. *Id.*

105. *Id.*

b. The Alternative Arguments.—After finding that the partnership agreement did not necessarily require the forced liquidation of all assets,[106] the court provided an alternative basis for its holding.[107] The court found that even if the partnership agreement did not provide for an alternative winding-up process, UPA's default rules did not necessarily require the liquidation of all assets in order to determine the true value of a partnership business.[108] Referring to its analysis of cases from other jurisdictions which allowed the use of less drastic alternatives, the court concluded that nothing in prior case law or UPA supported the contention that a forced liquidation was required to wind up a dissolved partnership.[109]

Furthermore, the court treated the recently adopted RUPA as indicia of the legislature's policy preference for continuity and stability of partnerships.[110] In explaining its position, the court found it "sound public policy to permit a partnership to continue either under the same name or as a successor partnership without all of the assets being liquidated. Liquidation can be a harmful and destructive measure . . . and is often unnecessary to determining the true value of the partnership."[111]

After the court analyzed and resolved the forced liquidation issue, it turned its focus to the reasonableness of the winding up process undertaken by the surviving partners in *Creel*.[112] The court affirmed the lower court's judgment, finding that the surviving partners undertook a good faith winding up of the business and holding that the liquidation demand was unwarranted.[113]

4. Analysis.—In *Creel v. Lilly*, the Court of Appeals held that Maryland's UPA does not grant a deceased partner's estate the right to demand the liquidation of all partnership assets as the only means of determining the true value of the business.[114] The court ruled that

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106. *Id.*

107. *Id.* at 103, 729 A.2d at 399.

108. *Id.*

109. *Id.*

110. *See id.* (finding support for its holding in Maryland's recent adoption of RUPA, "which encourages businesses to continue in either their original or successor form").

111. *Id.* at 104, 729 A.2d at 400 (citing Arnold v. Burgess, 747 P.2d 1315, 1322 (Idaho Ct. App. 1987)).

112. *Id.* at 104-07, 729 A.2d at 400-01.

113. *Id.* at 107, 729 A.2d at 401-02. The elements of a good faith winding up include a complete inventory of all partnership assets, undertaking an accurate accounting to determine the value of the business, and paying the decedent's proportionate share to the estate. *Id.* at 101, 107, 729 A.2d at 398, 402.

114. *Id.* at 110, 729 A.2d at 403.

where the remaining partners undertook a good faith winding up by providing for an inventory, an accurate accounting, and payment of the proportionate share to a decedent's estate, neither the default rules of partnership law nor existing precedent requires the forced liquidation of all assets.[115]

In so holding, the unanimous court correctly identified that forced liquidation of partnership assets is a harsh and disruptive measure.[116] Furthermore, the court sent a strong message that the stability of business enterprises will be afforded judicial protection, so long as surviving partners used reasonable alternative methods in determining the value of a partnership.[117] The court achieved this result by creating an equitable exception to the traditional liquidation-on-dissolution interpretation of UPA.[118] At the same time, the court used the opportunity to give an early endorsement to the new default rules of RUPA, which provide clear and reasonable options to the surviving partners to either buy out the deceased partner's share or dissolve the partnership.[119]

a. The Court Correctly Relied on RUPA's Progressive Breakup Provisions.—RUPA's breakup provisions are major reformations of the disruptive rules provided under UPA.[120] RUPA's provisions were drafted to redress the deficiencies of UPA and to ensure that the

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115. *Id.* at 107, 110, 729 A.2d at 401-02, 403.

116. *See id.* at 104, 729 A.2d at 400 (emphasizing that liquidation can be especially harmful to small businesses like Joe's Racing).

117. *See id.* at 107, 729 A.2d at 401-02. The court explained:

> Our goal in this case, and in cases of a similar nature, is to prevent the disruption and loss that are attendant on a forced sale, while at the same time preserving the right of the deceased partner's estate to be paid his or her fair share of the partnership. With our holding, we believe this delicate balance has been achieved.

Id.

118. *See id.* (finding that UPA, in light of RUPA's adoption, does not necessarily demand a forced liquidation of all partnership assets).

119. *Id.* at 91-92, 729 A.2d at 393 (describing RUPA as a more flexible alternative to UPA and in line with "the reasonable expectations of commercial parties in today's business world"). Arguably, the court could have disposed of the case by confining its analysis to the interpretation of the partnership agreement, which it held did not require the forced liquidation of assets. *See id.* at 102, 729 A.2d at 399. The court's "assuming arguendo" discussion indicates that the court used the opportunity to undertake a broader policy examination, albeit in dicta, to rectify the shortcomings of the liquidation-on-dissolution remedy. *See id.* at 104, 729 A.2d at 400 (finding it sound public policy to allow the continuation of a partnership without liquidation).

120. *Compare* MD. CODE ANN., CORPS. & ASS'NS §§ 9A-601, -602, -603, -701, -801, -802 (1999), *with id.* §§ 9-601, -602 (providing the respective breakup provisions of RUPA and UPA). *See also* Thomas Hurst, *Will the Revised Uniform Partnership Act (1994) Ever Be Uniformly Adopted?*, 48 FLA. L. REV. 575, 583 (1996) (describing the RUPA breakup provisions as one of the major innovations over UPA).

value, continuity, and stability of partnerships are protected by default rules.[121] RUPA's breakup provisions ensure that upon death or other grounds of a partner's separation, a smooth transition is available at the election of the surviving partners.[122]

(1) The Problems Behind UPA's Breakup Provisions.—The major cause of confusion and instability created by UPA's breakup provisions stemmed from the broad meaning given to the term "dissolution."[123] Under UPA, any departure or death in a partnership leads to automatic dissolution of the entire business.[124] Thus, unless the partners were sophisticated enough to utilize legal counsel to provide for contingencies such as death,[125] the default rules require the surviving partners to wind up and terminate the partnership.[126]

There is an enormous risk to the value and interests of a partnership when the business is formed without a continuation agreement, or when the deceased partner's estate denies a request for continuation.[127] Courts and legal commentators have criticized the disruptive and harmful consequences of UPA's automatic dissolution provisions.[128] Compounding the problem is the traditional UPA interpretation that equates partnership dissolution and winding up with

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121. *See* Weidner & Larson, *supra* note 29, at 1 (describing RUPA as changing "the law of partnership breakups [by giving] greater stability to partnerships [and] by abandoning the traditional rule that a partnership is dissolved every time a member leaves"); *see also Creel*, 354 Md. at 91, 729 A.2d at 393 (noting that RUPA was intentionally drafted to reflect emerging trends in partnership law).

122. *See* RUPA § 9A-603; *see also* Weidner & Larson, *supra* note 29, at 6 (stating that RUPA gives partners, who have contracted for stability, the option to buy out the departing partner's share and to continue the partnership without dissolution).

123. Weidner & Larson, *supra* note 29, at 3-5 (describing UPA's use of "dissolution" as a confusing concept that undercuts partners' desire to contract for stability in their business undertakings).

124. UPA § 9-602(4).

125. *See Creel*, 354 Md. at 87, 729 A.2d at 391 (finding that a partnership will not be automatically dissolved if the partnership agreement allows for the continuation of the partnership, notwithstanding a partner's death).

126. *See* UPA § 9-601. These provisions imply that the sole purpose of a partnership's continuation after dissolution is for the purpose of winding up the affairs of the enterprise, with a view to its ultimate termination. *See id.*

127. *See Creel*, 354 Md. at 89, 729 A.2d at 392 ("Over time, the UPA rule requiring automatic dissolution of the partnership upon the death of a partner, in the absence of consent by the estate to continue the business or an agreement providing for continuation . . . was viewed as outmoded by many jurisdictions including Maryland.").

128. *Id.*; *see also* John W. Larson et al., *Revised Uniform Partnership Act Reflects a Number of Significant Changes*, 10 J. PARTNERSHIP TAX'N 232, 236 (1993) (stating that UPA's use of the term "dissolution" led to considerable confusion).

liquidation.[129] The need to rectify the destabilizing effects of UPA's breakup provisions led some courts to invoke their equity jurisdiction to craft alternatives to the traditional liquidation-on-dissolution remedy.[130] In response, legislators and drafters of state laws initiated substantive changes to UPA's breakup provisions by drafting and enacting RUPA.[131]

(2) RUPA's Improvements to UPA's Breakup Provisions.—The desire to make fundamental policy changes to UPA's dissolution and winding-up provisions was one of the motivating factors behind RUPA's adoption.[132] The revision of these rules aimed to promote partnership stability and give reasonable options to the remaining partners in cases of a co-partner's separation from the venture.[133]

Legislators achieved the goal of clarity by changing the terminology used in UPA. First and foremost, "dissolution" has a limited meaning under RUPA.[134] Unlike UPA, where dissolution included all forms of separation from a partnership,[135] RUPA's dissolution definition is more narrow in scope and only refers to the actual termination of a partnership.[136] In place of "dissolution," RUPA introduces "dissociation" to designate events leading to the separation of a partner from the partnership.[137] "Dissociation" clears the confusion created by the usage of "dissolution" in UPA by eliminating the need to auto-

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129. *See* Bromberg, *supra* note 42, at 632 (stating that unless the remaining partner and the departing partner agree to the continuation of the business by working out a settlement, the basic assumption is that winding up is synonymous with liquidation); *see also* Gianakos v. Magiros, 238 Md. 178, 183, 208 A.2d 718, 721 (1965) (restating the rule that surviving partners are expected to liquidate the partnership's assets, unless consent to continue the business is secured from the estate).

130. *See supra* notes 53-74 and accompanying text (discussing the evolution of judicial alternatives to the traditional UPA liquidation rule).

131. *Creel*, 354 Md. at 89, 91-92, 729 A.2d at 392, 393. So far, 18 states have adopted RUPA, including California, Connecticut, Maryland, Texas, and Virginia, among others. *Id.* at 91 n.5, 729 A.2d at 393 n.5.

132. *See* Weidner & Larson, *supra* note 29, at 44 (describing RUPA's adoption as a major overhaul and reworking of UPA's breakup provision); *see also* Larson, *supra* note 128, at 236-38 (enumerating the fundamental policy changes RUPA makes over UPA, including the overhaul of the breakup provisions).

133. *See* Weidner & Larson, *supra* note 29, at 5-6 (describing the destabilizing effects of UPA's breakup provisions and how these were remedied in RUPA by the provision of a two-track option that gives stability and continuation for the remaining partners).

134. MD. CODE ANN., CORPS. & ASS'NS § 9A-801 (1999); Weidner & Larson, *supra* note 29, at 8 (stating that under RUPA, "dissolution" has no independent operative meaning other than meaning a partnership's termination).

135. *See supra* notes 123-126 and accompanying text (discussing the scope of the term "dissolution" under UPA).

136. *See* RUPA § 9A-801.

137. *Id.* § 9A-601(7)(i).

matically dissolve a partnership whenever a co-partner dies.[138] Thus, under RUPA, death ceases to be a ground for automatic dissolution.[139]

The other major change that RUPA brought to the breakup rules is the provision of two alternative options available to the remaining partners in the event of a co-partner's dissociation. The surviving partners may exercise the right to buy out the interests of the dissociated partner,[140] or may opt to proceed with winding up and terminating the partnership.[141] These options virtually eliminate the threat of a forced dissolution and liquidation demand by the estate, because dissolution and winding up occur at the discretion of the remaining partners.[142]

With these improvements to the default breakup rules, RUPA provides reasonably clear alternatives that promote business stability, continuity, and efficiency by avoiding the disruptive costs associated with forced liquidation.[143] Presented with these policy changes, the *Creel* court properly relied on RUPA's adoption in Maryland as a basis for deciding the case.[144]

b. The Court Correctly Used Its Equitable Power to Craft an Exception to UPA's Traditional Liquidation Interpretation.—The *Creel* court correctly acknowledged that the imposition of a forced liquidation, in winding up a dissolved partnership, can be harmful and destructive.[145] The court underscored the public policy reasons for disfavoring liquidation when such action is unnecessary, especially when there are less drastic alternatives available to determine the value of a business.[146]

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138. *See id.*; Weidner & Larson, *supra* note 29, at 8.

139. RUPA § 9A-601(7).

140. *See id.* § 9A-701 to -705.

141. *See id.* § 9A-801 to -807.

142. *See Creel*, 354 Md. at 91, 729 A.2d at 393 ("[U]nder RUPA the estate of the deceased partner no longer has to consent in order for the business to be continued nor does the estate have the right to compel liquidation.").

143. Weidner & Larson, *supra* note 29, at 6.

144. *See Creel*, 354 Md. at 91, 729 A.2d at 393 (finding that in drafting RUPA, Maryland's legislature was seeking to eliminate UPA's harsh automatic dissolution rules). Thus, even if RUPA was not yet the applicable governing default rule in *Creel*, the court relied on the rationale behind RUPA's modified breakup provisions in reaching its holding, denying the demand for forced liquidation.

145. *Id.* at 104, 729 A.2d at 400 ("A forced sale of partnership assets will often destroy a great part of the value of the business and may prevent the continuation of a valuable source of livelihood for former partners." (quoting Arnold v. Burgess, 747 P.2d 1315, 1322 (Idaho Ct. App. 1987))).

146. *Id.*

Faced with the prospect of applying the traditional interpretation of a soon-to-be inoperative default rule, and after considering how other jurisdictions have dealt with this issue, the *Creel* court correctly decided to craft an equitable exception.[147] Courts in other jurisdictions have crafted alternatives to the traditional liquidation remedy were also influenced by equitable considerations.[148] The *Creel* court may have been motivated by the fact that both the estate and the surviving partners would be better off with the alternative valuation method rather than liquidation.[149] It is likely that a forced liquidation would produce less value than if the partnership were permitted to continue the business as a going concern.[150] Thus, the court did both parties a favor by "preserving the pie" being valuated in the buy-out alternative.[151]

Until the progressive RUPA becomes the exclusive default rule for partnerships in Maryland, the *Creel* court's holding is useful in evaluating similarly situated controversies that may arise in the interim "phase-in" period.[152]

c. The Law After Creel.—In the absence of a written or functionally sufficient partnership agreement, the default rules of partnership law will apply to resolve a dispute.[153] RUPA, which takes full effect in 2003,[154] allows the remaining partners to exercise the option of either continuing the business by buying out the decedent's inter-

147. *See id.* at 92, 729 A.2d at 393-94 (following the lead of other jurisdictions that elected to provide non-liquidation alternatives to the traditional UPA interpretation).

148. *See, e.g.*, Goergen v. Nebrich, 174 N.Y.S.2d 366, 369 (N.Y. App. Div. 1958) (finding it inequitable and unfair to a surviving partner to conduct a liquidation sale when he desires to continue the business); Dow v. Beals, 268 N.Y.S. 425, 427 (N.Y. App. Div. 1933) (finding that ordering liquidation of assets in the midst of the Great Depression was tantamount to confiscation).

149. Interview with Robert Suggs, Professor of Law, University of Maryland School of Law (Sept. 27, 2000); *see also* Bromberg, *supra* note 42, at 647-48 (stating that for small business partnerships, it is rare that such enterprises can be sold for as much as the owners think the business is worth). Bromberg concludes, "the likelihood of loss of value is great enough to require every partnership to look to the ways of denying or restricting the liquidation right." Bromberg, *supra* note 42, at 647-48.

150. Bromberg, *supra* note 42, at 647-48.

151. Interview with Robert Suggs, *supra* note 149.

152. *See* MD. CODE ANN., CORPS. & ASS'NS § 9A-1204 (1999).

153. *See Creel*, 354 Md. at 99, 729 A.2d at 397 (reiterating that both UPA and RUPA apply only when there is no partnership agreement, the agreement is silent, or the agreement's provisions are contrary to law).

154. *See supra* note 76 and accompanying text.

est, or winding up and terminating the partnership.[155] Under the progressive RUPA rules, the estate of a deceased partner has little or no control to interfere with the continued viability of a partnership business.[156]

Until RUPA's breakup provisions take full effect in Maryland, partnership dissolutions will be governed by UPA.[157] In the interim, to deal with UPA's traditional interpretation equating a co-partner's death with automatic dissolution and liquidation, the *Creel* court crafted an equitable exception to the liquidation-on-demand remedy.[158] Surviving partners who wish to avoid the fangs of liquidation will be afforded judicial protection, so long as they wind up the partnership in good faith.[159] This entails establishing that the estate received its proportionate share, which can be determined after a reasonable valuation of the business through an accurate inventory and accounting.[160]

5. Conclusion.—Through its decision in *Creel*, the Court of Appeals correctly provided an equitable exception to UPA's liquidation remedy, which was the traditional method used to determine the value of a dissolved partnership. *Creel* allows surviving partners to use reasonable alternative methods in winding up a partnership, without undertaking a destructive and ruinous liquidation sale. This rule will promote the stability of partnerships while protecting the interests of a decedent's estate. The adoption of RUPA in Maryland influenced the crafting of the equitable exception in *Creel*. RUPA's progressive and efficient default breakup rules shift the ultimate decision as to the continued existence of a partnership from the hands of the estate to those of the surviving partners. RUPA allows the latter to buy out the

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155. RUPA § 9A-603; *see also supra* notes 140-142 and accompanying text (explaining the alternative tracks available for the surviving partners upon a partner's dissociation by death).

156. *See Creel*, 354 Md. at 91, 729 A.2d at 393 (stating that under RUPA "the estate of the deceased partner no longer has to consent in order for the business to be continued nor does the estate have the right to compel liquidation"). Arguably, whatever influence the estate may have with the continued viability of a partnership under RUPA is limited to challenging the reasonableness of valuation, accounting, and share determination. *See* RUPA § 9A-701(b) & (i) (providing rules to determine the buy-out price); *id.* § 9A-404 (mandating rules regarding fiduciary duties of partners to each other, and by extension, to the estate of a deceased partner).

157. *See* RUPA § 9A-1204.

158. *See supra* notes 145-151 and accompanying text.

159. *See Creel*, 354 Md. at 107, 729 A.2d at 402 (holding that a forced sale of assets is unwarranted if the surviving partners undertook a good faith winding up consisting of an accurate valuation and payment of proportionate share).

160. *Id.*

interests of a deceased partner and continue the business as a going concern. Thus, the *Creel* equitable exception and RUPA will work in tandem to afford surviving partners a measure of stability in their business endeavors.

DANIEL WOUBISHET

II. CIVIL PROCEDURE

A. *The Court of Appeals Makes It Clear That Specific Objections Are Required During Depositions*

In *Mayor of Baltimore v. Theiss*,[1] the Court of Appeals considered whether an objecting attorney is required to state the grounds of his objection during deposition testimony in order to preserve an issue for review at trial.[2] Relying heavily on the Court of Special Appeals's decision in *Davis v. Goodman*,[3] and its interpretation of Maryland Rule 2-415(g),[4] the court held that an attorney objecting to a curable error is required to state the basis for the objection during the deposition or face waiver of the objection at trial.[5] The court reasoned that Maryland's statutory and common-law history supports a requirement that attorneys state the specific grounds for objections during depositions in the interest of encouraging fairness and expediency in the judicial process.[6] Maryland Rule 2-415(g) is closely modeled on Federal Rule of Civil Procedure 32(d)(3),[7] as are several other states' deposition

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1. 354 Md. 234, 729 A.2d 965 (1998). Judge Cathell wrote the majority opinion and was joined by Judges Eldridge, Chasanow, Raker, and Wilner. *Id.* at 237, 729 A.2d at 966. Judge Rodowsky, joined by Chief Judge Bell, wrote a separate concurring opinion. *Id.* at 235, 258, 729 A.2d at 965, 978 (Rodowsky, J., concurring).

2. *Theiss*, 354 Md. at 238, 729 A.2d at 967.

3. 117 Md. App. 378, 700 A.2d 798 (1997).

4. MD. R. 2-415(g). Rule 2-415(g) states in full:

> All objections made during a deposition shall be recorded with the testimony. An objection to the manner of taking a deposition, to the form of questions or answers, to the oath or affirmation, to the conduct of the parties, or to any other kind of error or irregularity that might be obviated or removed if objected to at the time of its occurrence is waived unless a timely objection is made during the deposition. An objection to the competency of a witness or to the competency, relevancy, or materiality of testimony is not waived by failure to make it before or during a deposition unless the ground of the objection is one that might have been obviated or removed if presented at that time.

Id.

5. *Theiss*, 354 Md. at 257-58, 729 A.2d at 978.

6. *Id.* at 239-57, 729 A.2d at 967-78 (reviewing the common law regarding timely objections and discussing the development of the Maryland Rules of Discovery).

7. *Compare* FED. R. CIV. P. 32(d)(3)(B), *with* MD. R. 2-415(g). Federal Rule 32(d)(3) states in relevant part:

> (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.
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> (B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

FED. R. CIV. P. 32(d)(3); *see also supra* note 4 (setting forth the text of MD. R. 2-415(g)).

objection rules. [8] The Court of Appeals's decision in *Theiss* followed the reasoning used in these other cases and thus should signify to Maryland practitioners that the specific objection will be required in the future.

1. The Case.—On June 21, 1995, Darla Theiss fell and broke her ankle while walking to her car in the Brooklyn neighborhood of Baltimore City.[9] She was taken to a local hospital where screws were surgically inserted into her ankle to aid in its healing.[10] In the two years following the injury, Theiss began experiencing significant pain and loss of movement in her ankle.[11] A return to the orthopedic surgeon confirmed that she had developed arthritis in the injured joint.[12] The orthopedic surgeon referred Theiss to Dr. Mark Myerson, a foot-and-ankle specialist at Union Memorial Hospital in Baltimore.[13] Dr. Myerson treated Theiss with several therapy methods, including cortisone injections, pain medications, and special braces for her ankle.[14] According to Dr. Myerson's videotaped deposition testimony, which the plaintiff hoped to introduce at trial,[15] these measures were merely temporary, and Theiss would require surgery to enjoy more lasting relief from her pain.[16]

The issue in this case stems from the manner in which plaintiff's counsel framed certain questions during Dr. Myerson's deposition.[17] Instead of asking Dr. Myerson whether each of his opinions was "within a reasonable medical probability," plaintiff's counsel asked Dr. Myerson several questions about Theiss's condition[18] and then qualified all of the physician's earlier answers in the deposition by asking whether those answers had been based on a reasonable medical probability.[19] Defense counsel objected after each question by simply

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8. *See infra* notes 130-157 and accompanying text (comparing Maryland's deposition objection rule to those of Georgia, North Carolina, North Dakota, and Ohio).

9. *Theiss*, 354 Md. at 237, 729 A.2d at 966.

10. Joint Record Extract at E47, *Theiss*, (No. 123).

11. *Id.*

12. *Id.* at E58.

13. *Id.* at E44.

14. *Id.* at E59-60.

15. *See Theiss*, 354 Md. at 238, 729 A.2d at 967.

16. Joint Record Extract at E61-62.

17. *Theiss*, 354 Md. at 237, 729 A.2d at 966.

18. Joint Record Extract at E67-69.

19. *Id.* at E70-71.

stating the word "objection."[20] Only once did he state the specific grounds for his objection.[21]

When this issue arose at trial in the Circuit Court of Baltimore City, the court held that the utterance of a general objection was not sufficient to preserve the issue for trial if the source of the objection was a curable error.[22] The trial judge based his decision,[23] in large part, on the rule set out by the Court of Special Appeals in *Davis v. Goodman*,[24] and its interpretation of Maryland Rule 2-415(g).[25] The circuit court overruled all of the defendant's objections to Dr. Myerson's deposition testimony, and the jury found in favor of Theiss, awarding her $128,000 in compensatory damages.[26] Following the trial court's ruling, the defendants appealed to the Maryland Court of Special Appeals.[27]

Before the parties presented their arguments in the intermediate court, the Court of Appeals issued a writ of certiorari on its own motion to determine whether the trial court had improperly overruled the defendant's objections to the form of deposition questions because the objections were not sufficiently specific.[28]

2. Legal Background.—

a. Discovery at Common Law.—The English common-law tradition had no concept of a pre-trial discovery period. Quite different from the present-day discovery period, the common law treated the period before trial as yet another playing field in an adversarial contest.[29] To this end, the parties prepared their own witnesses for trial and consulted their own experts, but were never able to contact ad-

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20. *See id.* at E66-75.

21. *Id.* at E32. The trial judge overruled the objection on the basis of mootness because the question was never answered by the deponent. *Id.*

22. *Theiss*, 354 Md. at 239, 729 A.2d at 967.

23. *Id.* at 237, 729 A.2d at 967.

24. 117 Md. App. 378, 700 A.2d 798 (1997).

25. *See id.* at 396-404, 700 A.2d at 806-10 (discussing Rule 2-415(g) and finding that objections to the form of a question must be specific because this error is easily correctable at deposition). The *Davis* court reasoned that if a lawyer merely said "objection," she would be objecting to the substance of the question. *Id.* at 399, 700 A.2d at 808. To object to the form of a question instead of its content, counsel would have to specifically state that the objection was directed to the form of the question. *Id.*

26. *Theiss*, 354 Md. at 237-38, 729 A.2d at 967.

27. *Id.* at 237, 729 A.2d at 966.

28. *Id.* at 238, 729 A.2d at 967.

29. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 1.2 (4th ed. 1992).

verse witnesses before trial.[30] While lawyers generally were able to logically deduce the identities of some of the adverse witnesses, certain witnesses remained a mystery until the parties met in the courtroom.[31] This was especially true with respect to expert witnesses. Because counsel were not permitted to depose witnesses before trial, it was not possible to cross-examine experts as effectively then as it is today.[32] Instead, experts often were simply cheerleaders for the parties that hired them.[33]

In a 1906 address, Roscoe Pound, a commissioner for the Supreme Court of Nebraska who would later become the dean of Harvard Law School, spurred the reform movement in civil procedure that would lead to the enactment of the Federal Rules of Civil Procedure in 1938.[34] In his speech, Pound accused judges and lawyers of supporting a confusing and non-uniform cast of court procedure rules to the detriment of lay people, often appearing as fact witnesses, who were unable to understand the rules of the courtroom.[35]

Reformers took up Pound's call for reform of existing pre-trial procedures and expanded its scope in advocating a uniform civil procedure code for use in all federal trials.[36] Not only would the new civil procedure rules make the courts less prone to lawyers' surprise tactics, but they would also define the issues more clearly and increase the amount of relevant evidence discovered prior to trial.[37]

The beneficiaries of this system would be the parties, who could more fully explore the other side's contentions; the lawyers, who would know at an earlier point whether they should encourage their clients to settle their claims; and the justice system, which would enjoy

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30. *See* JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1856(b) & (c) (3d ed. 1940) (stating that under the common law, discovery was limited to the extraction of the opponent's own testimony; the names of the opponent's witnesses or other evidence need not be disclosed).

31. WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 9 (1968).

32. *See id.* at 11 (stating that enactors of the Federal Rules of Civil Procedure expected that witnesses' testimony could be more easily cross-examined at trial because opposing counsel could compare trial testimony with deposition transcripts).

33. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 739 (1906) (stating that the pre-Federal Rules system "turn[ed] witnesses, and especially expert witnesses, into partisans pure and simple").

34. GLASER, *supra* note 31, at 10 (citing Pound, *supra* note 33, at 738-39); *see also* DAVID M. WALKER, THE OXFORD COMPANION TO LAW 973 (1980) (providing a biographical summary of Roscoe Pound).

35. GLASER, *supra* note 31, at 10 (citing Pound, *supra* note 33, at 738-39).

36. *See* JAMES & HAZARD, *supra* note 29, § 1.7 (noting the pressures for reform and establishment of a system of federal procedure).

37. GLASER, *supra* note 31, at 11.

enhanced judicial economy.[38] Since each party would have a more lucid understanding of the issues, unnecessary witnesses and evidence could be identified and excluded before trial, thereby streamlining the litigation process.[39] Some theorists even went so far as to suggest that there would be fewer trials following the adoption of a civil procedure code, and that parties would settle their cases more frequently because they would be fully cognizant of the strengths and weaknesses of the other side's claim.[40]

b. Maryland Common Law.—The first rules concerning court procedure were adopted by the New York legislature in 1848.[41] As years passed, other states adopted all or part of the New York code in creating their own civil procedure rules.[42] Maryland followed this trend, as reflected by early cases concerning pre-trial objections based upon civil procedure codes and judicially created law.

Maryland began its adoption of defined rules concerning deposition objections with the Court of Appeals's decision in *Kerby v. Kerby*.[43] In that case, the deposing attorney asked a leading question of one of his witnesses.[44] Opposing counsel failed to object to the question until trial.[45] The court held that opposing counsel was required to state the grounds for his objection "at the time [the interrogatory was] propounded, in order to give a chance for correction into admissible form."[46]

Three years later, the Court of Appeals reaffirmed its *Kerby* holding in *Brown v. Hardcastle*.[47] In *Brown*, the plaintiff's counsel objected to leading questions that had been asked by the defendant's counsel during a deposition, but the objection was overruled because counsel

38. *See id.* at 9-11 (describing the goals of pre-trial discovery).
39. *Id.* at 11.
40. *Id.*
41. *Id.* at 18.
42. *Id.*
43. 57 Md. 345 (1882).
44. *Id.* at 361.
45. *Id.*
46. *Kerby*, 57 Md. at 361; *see* Balt. & Ohio R.R. Co. v. Shipley, 39 Md. 251, 255 (1874) (stating that if the form of a question is invalid, counsel must object at the time the question is propounded); Jones v. Jones, 36 Md. 447, 457 (1872) (holding that an objection to a leading question must be made at the time of the question or it is waived); Smith v. Cooke, 31 Md. 174, 179 (1869) (finding that an objection to a leading question should have been made when the question was asked at deposition). The word "interrogatory," as used in this sense, has been interpreted by the Court of Appeals to refer generally to any questions asked at a pre-trial proceeding or at trial. *Theiss*, 354 Md. at 239-40 & n.2, 729 A.2d at 968 & n.2.
47. 63 Md. 484 (1885).

had failed to note the grounds of his objection in his list of exceptions.[48] The court cited *Kerby* in holding that specific grounds for an objection must be stated during the deposition so that deposing counsel has the opportunity to cure the error.[49]

Doggett v. Tatham[50] reiterated *Kerby*'s timeliness requirement, stating that unless curable objections were noted at the time of the deposition, they would be waived at trial.[51] The Court of Appeals cited the longstanding nature of the *Kerby* rule, holding that "where a question was supposed to be objectionable upon this ground, the objection, and the reason for it must be noted at the time, in order to afford the party propounding the question an opportunity to reframe it in such form that it would not be open to this objection." [52]

Kerby, *Brown*, and *Doggett* were the only three Maryland cases concerning pre-trial objections that were brought to the state appellate courts' attention between 1882 and 1997.[53] While the pre-trial procedure rules of the nineteenth century were adversarial and likely incomprehensible to lay people, the push for, and subsequent adoption of, a set of uniform federal rules in 1938 changed the pre-trial stage of litigation from an adversarial setting to one in which there was a greater emphasis placed on the search for truth.[54]

c. Enactment of the Federal Rules of Civil Procedure.—By the early 1930s, twenty-eight states had created court procedure codes.[55] At that time, the federal courts were bound by the rules enacted by the states in which they were located, pursuant to the Conformity Act of 1872.[56] In 1934, however, Congress cleared the way for federal court procedure reform with the enactment of the Rules Enabling

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48. *Id.* at 494-95. Before the advent of the modern day court reporter's shorthand machine, Maryland lawyers filed Lists of Exceptions along with deposition testimony that served as a separate record of their objections to deposition testimony. *Theiss*, 354 Md. at 244-45, 729 A.2d at 970-71. By the 1940s, this practice was abandoned and objections were entered into the deposition record. *Id.*

49. *Brown*, 63 Md. at 495.

50. 116 Md. 147, 81 A. 376 (1911).

51. *Id.* at 151, 81 A. at 378.

52. *Id.* The defendant's attorney in *Doggett* objected to the question on the basis that it was leading. *Id.*

53. *Theiss*, 354 Md. at 241, 729 A.2d at 968.

54. GLASER, *supra* note 31, at 11.

55. New York's code of court procedure, written by David Dudley Field, was adopted in 1848. *Id.* at 18. Twenty-seven states adopted all or part of this code in enacting their own court procedure rules. *Id.*

56. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197 (repealed 1938).

Act,[57] thus allowing Chief Justice Charles Evans Hughes to appoint an advisory committee to create a full set of court procedure rules.[58] The Federal Rules of Civil Procedure were formally enacted in 1938.[59] The new Federal Rules encapsulated many of the ideas of the original reformers, including a less adversarial pre-trial discovery period in which emphasis was placed on extensive investigation of the issues by both parties.[60] In addition, after the Federal Rules were enacted, judges were no longer *required* to grant a new trial for procedural error.[61] Instead, they could weigh the prejudicial value of the error in deciding whether to award a new trial or reverse a judgment.[62]

d. The Maryland Rules of Civil Procedure.—In 1941, Maryland adopted a uniform code of civil procedure.[63] In defining the relationship between Maryland's code and the common law, the Court of Appeals held in several instances that these rules did not constitute the complete body of Maryland pre-trial procedure rules and that any common-law principles not inconsistent with the Maryland Rules were still enforceable in the courts.[64]

Maryland Rule 2-415(g) governs deposition procedure.[65] Its language is substantively the same as Federal Rule of Civil Procedure 32(d)(3),[66] which governs objections to deposition testimony.[67] Be-

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57. The Rules Enabling Act, 28 U.S.C. § 2072(a) (1994), provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals."

58. GLASER, *supra* note 31, at 19.

59. *Id.* Between 1935 and 1956, the Advisory Committee for the Federal Rules of Civil Procedure periodically revised the Rules as the need arose. *Id.* at 20. Since 1956, revisions to the Federal Rules have been handled by the Judicial Conference of the United States, composed of the Chief Judge of each of the eleven Federal Circuits, a District Judge elected by the judges of each Circuit, the Chief Justice of the Court of Claims, and the Chief Justice of the Supreme Court, who acts as chairman. *Id.*

60. *See id.* at 22 (quoting JAMES W. MOORE, 1A MOORE'S FEDERAL PRACTICE ¶ 0.504 (1st ed. 1938)).

61. *See id.* (explaining that an "essential feature" of the Federal Rules was "'[a] general emphasis against technical error and that harmless error be treated as harmless error'" (quoting MOORE, *supra* note 60, at ¶ 0.504)).

62. *See id.*

63. *See Theiss*, 354 Md. at 246, 729 A.2d at 971-72.

64. *Id.* at 246-47, 729 A.2d at 972; *see, e.g.*, Gardner v. Bd. of County Comm'rs, 320 Md. 63, 80, 576 A.2d 208, 216 (1990) (explaining that the Maryland Rules did not abrogate all of the common law existing prior to the enactment of the Rules).

65. MD. R. 2-415(g). See *supra* note 4 for the full text of this Rule.

66. *Compare* MD. R. 2-415(g), *with* FED. R. CIV. P. 32(d)(3)(B).

67. *See* FED. R. CIV. P. 32(d)(3)(B). The Federal Rule states, in relevant part, that

> [e]rrors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or

cause of the similarities of structure and language between the Maryland Rules and the Federal Rules, the Court of Appeals has stated that it will look toward decisions using the Federal Rules to interpret Maryland law.[68] Presently, there are no federal cases in Maryland that discuss what are considered to be correct objections during depositions, but according to the committee note to Maryland Rule 2-415 and to the federal discovery guidelines for the District of Maryland, objections should be stated concisely so that they avoid giving the effect of coaching the witness.[69] Under these rules, "objection, form" and "objection, compound question" would both be an acceptable means of stating an objection.[70]

e. Davis v. Goodman*: Deposition Objections Under the Maryland Rules.*—The civil procedure rule fashioned by the Court of Appeals in *Kerby*, *Brown*, and *Doggett* remained untouched for nearly a century before the issue of correct deposition objections came before the Maryland courts in *Davis v. Goodman.*[71] In *Davis*, a minor brought suit against his landlord for brain damage that he suffered as a result of living in an apartment that had been painted with lead-based paint.[72] At the deposition of a neurological specialist, counsel for defendant objected to numerous questions put before the expert, because the deposing attorney did not ask whether the physician's opinions were

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affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

Id.

68. Bartell v. Bartell, 278 Md. 12, 18, 357 A.2d 343, 346 (1976); Snowhite v. State, 243 Md. 291, 308-09, 221 A.2d 342, 352 (1966).

69. The committee note states in relevant part: "Objections should be stated as simply, concisely, and non-argumentatively as possible to avoid coaching or making suggestions to the deponent . . . . Examples include, 'objection, leading;' 'objection, asked and answered;' and 'objection, compound question.'" MD. R. 2-415 committee note (Supp. 2000). Discovery Guideline 5(b) states:

> During the taking of a deposition it is presumptively improper for an attorney to make objections which are not consistent with Fed. R. Civ. P. 30(d)(1). Objections should be stated as simply, concisely and non-argumentatively as possible to avoid coaching or making suggestions to the deponent, and to minimize interruptions in the questioning of the deponent (for example: "objection, leading"; "objection, asked and answered"; "objection, compound question"; "objection, form").

MD. CODE ANN., RULES OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND, app. 5(b), at 960 (1999).

70. *See supra* note 69.

71. *See* Davis v. Goodman, 117 Md. App. 378, 700 A.2d 798 (1997) (determining whether the Maryland Rules required attorneys to specify their objections to the form of deposition questions).

72. *Id.* at 385-88, 700 A.2d at 801-03.

based on a "reasonable degree of medical probability."[73] The trial judge overruled counsel's objections, explaining that "in order to preserve an objection as to the form of a question, the objection at deposition must be specific so that opposing counsel would have an opportunity to correct his mistake(s)."[74]

The Court of Special Appeals held that a specific objection is required during a deposition to preserve the objection for review at trial.[75] The court reasoned that, in order to comply with Rule 2-415(g), counsel needed to object to the "error or irregularity" contained in the question.[76] Stating a general objection would not fulfill this requirement, as it would merely serve as an objection "to the question or the answer."[77] To object in a correct manner, an attorney would have to object to the error with sufficient specificity so that the deposing attorney would know the reason for the objection.[78]

While the majority of Maryland's deposition objection cases were decided before the enactment of the Federal Rules of Civil Procedure and before Maryland's enactment of its own civil procedure code, the Court of Appeals's decisions in those cases followed a similar line of reasoning to that applied by the Court of Special Appeals in *Davis v. Goodman* in 1997.[79] The *Theiss* case would give the Court of Appeals the opportunity to discredit the lower court's interpretation of 2-415(g) in *Davis* or to reiterate the requirement for specific objections at depositions in Maryland.

3. The Court's Reasoning.—

a. Application of the Davis *Test.*—In *Mayor of Baltimore v. Theiss*, the Court of Appeals held that objections to the form of a question must be specific.[80] In reaching this decision, the *Theiss* court placed special emphasis on the decision reached in *Davis v. Goodman* because of the similar facts and issues of law in the two cases.[81] Aside from noting the applicability of Maryland Rule 2-415(g) to the facts of the case, the court also strongly considered the positive future results of following the *Davis* interpretation of Rule 2-415(g).[82] The court

73. *Id.* at 397, 700 A.2d at 807.
74. *Id.*
75. *Id.* at 385, 700 A.2d at 801.
76. *Id.* at 399, 700 A.2d at 808.
77. *Id.*
78. *Id.* at 400, 700 A.2d at 808.
79. *See id.* at 397, 700 A.2d at 807.
80. *Theiss*, 354 Md. at 239, 720 A.2d at 967.
81. *Id.* at 252, 729 A.2d at 975; *see also supra* notes 72-72 and accompanying text (discussing the Court of Special Appeals's decision in *Davis*).
82. *See Theiss*, 354 Md. at 254-55, 729 A.2d at 976.

reasoned that the interests of all parties are served when an objecting attorney states his or her objection with sufficient specificity such that the deposing attorney is able to correct his or her question and the information sought remains part of the deposition record.[83]

However, the Court of Appeals went further than the Court of Special Appeals in its definition of what constitutes a proper objection at a deposition. While "objection to the form of the question" would have been a sufficiently specific objection for the *Davis* court, the *Theiss* court stated that this was merely "mimicking the general language of the rule."[84] Instead, the Court of Appeals reasoned that the properly specific objection in the case at hand would have been "'Objection; improper form of questioning a medical expert.'"[85]

b. Policy Arguments.—While the court began its opinion with a lengthy discourse on Maryland statutory and case law,[86] it based its decision primarily upon the policy interests of fairness and expediency.[87] In the spirit of fair play, the court explained that the aim of the justice system was not to keep deposition testimony out of trial when the question yielded the proper response, but was phrased in an incorrect form.[88] Excluding such a question, the court reasoned, would run counter to the judicial principle of allowing each party to have its day in court by penalizing those parties whose lawyers suffered a "'slip of the tongue'" during deposition testimony.[89]

The court also reasoned that requiring specific objections during depositions would streamline the pre-trial process by limiting the number of frivolous objections made during depositions.[90] By requiring counsel to state specific grounds for an objection, lawyers would be limited to those objections for which they could instantaneously state proper grounds.[91] If the general objection was permissible, the court reasoned, attorneys would have months or even years before

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83. *Id.* at 253-54, 729 A.2d at 975-76 (quoting *Davis*, 117 Md. App. at 400-01, 700 A.2d at 808-09).

84. *Id.* at 254-55, 729 A.2d at 976.

85. *Id.* at 254, 729 A.2d at 976.

86. *See id.* at 239-46, 729 A.2d at 968-71 (outlining the evolution of pre-trial objections at common law and under early court rules in Maryland).

87. *See id.* at 254, 729 A.2d at 976-77 (stating that the specific objection requirement allows attorneys to correct errors as to form at the deposition, thus preserving more of the deponent's testimony for trial).

88. *See id.* at 253, 729 A.2d at 975 (quoting *Davis*, 117 Md. App. at 400-01, 700 A.2d at 808-09).

89. *Id.* (quoting *Davis*, 117 Md. App. at 400, 700 A.2d at 808).

90. *Id.* at 253-54, 729 A.2d at 975 (quoting *Davis*, 117 Md. App. at 400-01, 700 A.2d at 808-09).

91. *Id.* at 254-55, 729 A.2d at 976.

trial to peruse the deposition transcript and formulate specific grounds for their objections.[92] In addition, if counsel could simply state the word "objection" without being required to give an explanation, an objecting attorney could easily harass both the deposing attorney and the deponent by objecting to every question.[93] Under such circumstances, the objecting attorney could "'[s]andbag[ ]' an opposing counsel by attempting to defer the issue of the proper form of the question to a point in the process, immediately prior to the trial, when correction is necessary but the witness is not available to answer a new, properly framed question."[94]

In his concurrence, Judge Rodowsky, joined by Chief Judge Bell, dismissed the majority's policy arguments as being contrary to the adversarial system, and warned against the abuses that might result from its decision.[95] Instead, Judge Rodowsky reasoned that the objections should have been overruled because the form of the questions was correct, since Maryland has no law requiring that medical experts be asked if their opinions are based on a "reasonable medical certainty."[96] Also, Judge Rodowsky stated that while the third sentence of Rule 2-415(g) requires a statement of grounds when the objection concerns the qualifications of the witness or the competency, relevance, or materiality of testimony, the second sentence, which refers to form errors, merely requires that a reasonable objection be made to preserve the issue for trial.[97] Thus, Judge Rodowsky reasoned that it is only necessary for counsel to state the basis of an objection for those errors enumerated in the third sentence of the Rule.[98]

4. Analysis.—Faced with ambiguous statutory language and limited case law, practitioners now must determine the place that the general objection has in Maryland depositions. There are several areas to consider in making the assertion that the general objection will not preserve a form question for trial. First, this Note examines the different legislative enactments and guidelines on which various judges have relied in interpreting the Maryland deposition objection

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92. *Id.* at 255, 729 A.2d at 976.

93. *Id.* at 253-54, 729 A.2d at 976 (quoting *Davis*, 117 Md. App. at 400-01, 700 A.2d at 808-09).

94. *Id.* at 257, 729 A.2d at 977.

95. *Id.* at 263-64, 720 A.2d at 980-81 (Rodowsky, J., concurring).

96. *Id.* at 261-63, 729 A.2d at 980-81.

97. *Id.* at 262-63, 729 A.2d at 980-81; *see also* MD. R. 2-415(g) (stating that an objection must be made for form errors and that the grounds of an objection to a witness's competency must be specifically articulated).

98. *Theiss*, 354 Md. at 262-63, 729 A.2d at 980-81 (Rodowsky, J., concurring).

rule.[99] Second, this Note considers case law in other jurisdictions with similar civil procedure codes.[100] Finally, from these analyses, this Note suggests practical guidelines for practitioners attempting to make sense of the Court of Appeals's decision in *Theiss*.[101]

a. Different Rules, Different Results.—In attempting to interpret legislative meaning, it is often helpful to examine the legislative guidelines that accompany the actual law. In relation to Maryland Rule 2-415(g), the concurring judges in *Theiss* noted that Guideline 9 accompanying the Rule strongly supports the theory that grounds for an objection do not have to be stated during a deposition.[102]

Guideline 9 states that "[a]ttorneys objecting to the form of the question at deposition are encouraged, if requested, to state the reason for the objection."[103] Thus, Guideline 9 would suggest that there is no requirement to state the grounds for an objection unless requested by opposing counsel. There are two ways to interpret this guideline. The first is that this guideline is simply asking attorneys to be cooperative, rather than combative, at depositions because no judge is present to resolve disputes.[104] The second possibility is that this guideline is suggesting that depositions should be handled like trial, where specific objection is only required upon request.[105] Maryland is unlike most other states in that a general objection at trial is sufficient to preserve the issue for appellate review.[106] The general objection greatly benefits Maryland trial attorneys because it preserves

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99. *See infra* notes 102-129 and accompanying text.

100. *See infra* notes 130-157 and accompanying text.

101. *See infra* notes 158-166 and accompanying text.

102. *Theiss*, 354 Md. at 259-60, 729 A.2d at 979 (Rodowsky, J., concurring); *see* MD. R. CIV. P. tit. 2, ch. 400, Gdln. 9. According to the Maryland State Bar Association, the Guidelines "are not officially part of the Maryland Rules and have not been adopted or approved by the Court of Appeals." *Id.* pmbl.

103. MD. R. CIV. P. tit. 2, ch. 400, Gdln. 9.

104. *Cf.* JAMES & HAZARD, *supra* note 29, at 176-79 (stating that the framers of the Federal Rules of Civil Procedure wanted discovery to be a non-adversarial exchange).

105. The language of Guideline 9 is closely related to that of Maryland Rule 2-517(a), which governs objections to trial testimony. Rule 2-517(a) states, in relevant part:

> *Objections to evidence.* An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise the objection is waived. The grounds for the objection need not be stated unless the court, at the request of a party or on its own initiative, so directs.

MD. R. 2-517(a).

106. *See id.*; Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 MD. L. REV. 1032, 1042-43 (1995) (explaining that while Maryland allows general objections at trial, federal practice and the majority of states require specific objections).

all possible grounds for review.[107] Therefore, if no grounds are stated, any grounds for objection may be argued upon review.[108] However, if the grounds for an objection are raised at trial, the objecting party is restricted to those grounds upon appeal.[109] For this reason, practitioners will often refrain from stating the basis of their objection at trial unless the judge requests such specificity.[110]

The concurrence in *Theiss* reasoned that the general objection should be permissible during depositions because Maryland statutes mandate that deposition procedure be patterned upon trial practice.[111] In support of this proposition, the concurrence cited Rule 8(a) of the 1945 Maryland Rules, which provides that deposition testimony should proceed in the same manner as trial testimony.[112] Since the general objection is permitted at trial, the concurrence argued that it should also be allowed during depositions.[113] The concurring judges further supported their argument by focusing on the similar vocabulary used in Rule 2-517(a), pertaining to objections at trial, and Guideline 9 of Rule 2-415(g), which governs objections at depositions.[114] Both Rule 2-517(a) and Guideline 9 state that counsel should specify the basis for their objections if requested either by the court or by opposing counsel.[115] The concurrence took this one step further, stating that, because counsel at depositions have to specify their reasons for objecting upon request, a general objection is sufficient in the absence of a request for specificity by opposing counsel.[116]

In addition to considering the linguistic similarities between Guideline 9 and Rule 2-517, the concurring members of the Court of Appeals also compared the meanings attributed to other portions of

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107. *See* Anderson v. Litzenberg, 115 Md. App. 549, 569, 694 A.2d 150, 160 (1997) (acknowledging that if the specific ground of the objection is not stated, all possible grounds may be raised upon appeal (citing Bailey v. State, 263 Md. 424, 427, 283 A.2d 360, 361 (1971); Blondes v. Hayes, 29 Md. App. 663, 350 A.2d 163 (1976))).

108. *Id.*

109. Klein v. Weiss, 284 Md. 36, 55, 395 A.2d 126, 137 (1978); *Anderson*, 115 Md. App. at 569, 694 A.2d at 160.

110. *See* Hornstein, *supra* note 106, at 1042-43. It is worth noting, however, that the use of the general objection—firmly entrenched in Maryland's jurisprudence—is becoming less frequent, as more and more members of the bar went to law school after the enactment of the Maryland Rules of Evidence or have practiced in other jurisdictions where the specific objection is required at trial. *See id.*

111. *Theiss*, 354 Md. at 259, 729 A.2d at 978 (Rodowsky, J., concurring).

112. *Id.* at 260, 729 A.2d at 979.

113. *Id.* at 259-60, 279 A.2d at 978-79.

114. *Id.*

115. *Id. Compare* MD. R. 2-517(a), *with* MD. R. CIV. P. tit. 2, ch. 400, Gdln. 9.

116. *See Theiss*, 354 Md. at 259-60, 729 A.2d at 979 (Rodowsky, J., concurring).

Rule 2-415 in an attempt to clarify the terms of Rule 2-415(g).[117] General principles of statutory interpretation state that the terms and meanings employed should be consistent throughout a rule.[118] Rule 2-415(b) states that "[w]hen a deposition is taken upon oral examination, examination and cross-examination of the deponent may proceed as permitted in the trial of an action in open court."[119] On this basis, the concurrence in *Theiss* reasoned that, while Rule 2-415(g) might be interpreted to require a specific objection in depositions, Rule 2-415(b) more explicitly would allow a general objection in depositions, because this type of objection is permitted at trial.[120]

b. Inherent Differences Between Trials and Depositions.—The concurring judges in *Theiss* read a literal meaning into Rule 2-415(b). While certain aspects of the deposition were intended to mimic trial, it is clear that the two stages of litigation are not identical and therefore should not abide by identical rules. The deposition clearly mirrors certain aspects of trials: a witness or party is sworn under oath and is questioned first by one attorney and then by the other; each has the ability to raise the same objections at a deposition as at trial, and there is a preserved record.[121] However, the clear difference between the two is that, unlike at trial, the judge is not present at the deposition.

Thus, each of the rules mentioned above can be reconciled with the majority's decision in *Theiss* if restricted to its proper forum. The two rules which seem to conflict most—Maryland Rules 2-415(g) and 2-517(a)—are not incompatible, because the former governs objections made during depositions while the latter regulates objections to evidence presented at trial.[122] The differences between the two rules highlight the dissimilarities between the trial and discovery stages.[123] Rule 2-517(a) has a discretionary measure built into it: the judge is present at the proceeding and can compel attorneys to state the grounds for their objections.[124] The situation differs in a deposition, where the lawyers control the proceedings and are bound only by the rules of civil procedure.[125] "[B]ecause no impartial arbiter is present,

117. *Id.* at 259, 729 A.2d at 978.

118. *See id.* (applying "the ordinary rules of construction").

119. MD. R. 2-415(b).

120. *Theiss*, 354 Md. at 259, 729 A.2d at 978 (Rodowsky, J., concurring).

121. JAMES & HAZARD, *supra* note 29, § 6.3.

122. Davis v. Goodman, 117 Md. App. 378, 400, 700 A.2d 798, 808 (1997).

123. *Id.*

124. *Id.*; *see* MD. R. 2-517(a) (stating that attorneys need not state grounds for objections at trial unless requested by the judge).

125. *Davis*, 117 Md. App. at 400, 700 A.2d at 808.

attorneys cannot be forced to say anything. Accordingly, the opportunity of a questioner to recognize and correct an error at deposition is reduced."[126]

The rules of pre-trial procedure cannot have the same discretionary language as those that govern trial testimony. Since judges are absent from depositions, they cannot rule as to when the grounds for objection need to be explained.[127] To rectify this, Maryland rules mandate specificity from the lawyers at a deposition. Thus, according to the most recent interpretations of Rule 2-415(g),[128] objecting counsel must state fairly specific objections to any curable errors or waive the opportunity for review by the trial judge.[129]

c. Other Jurisdictions.—The Maryland Rules of Civil Procedure are modeled upon the Federal Rules of Civil Procedure,[130] as are the procedure rules of most states.[131] The federal courts that have addressed similar issues to those addressed in *Theiss* have not ruled on the explicit meaning of Federal Rule 32(d)(3), but their decisions may provide some insight into the issue at hand.[132] The Tax Court in *Exxon Corp. v. Commissioner*[133] considered the applicability of Tax Court Rule 85(d), which contains essentially the same language as Maryland Rule 2-415(g).[134] In *Exxon*, a general objection was raised regarding the validity of certain deposition questions that were in

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126. *Id.*

127. *Id.*

128. *See Theiss*, 354 Md. at 245-53, 729 A.2d at 971-75 (observing that the new version of Rule 415(g) is not substantively different from the old rules and still stands for the proposition that an objection must be made in a timely fashion so that the questioner may clear up the problem); *Davis*, 117 Md. App. at 399, 700 A.2d at 808 (noting that Rule 415(g) requires an objection to the error rather than the question itself to preserve an objection).

129. *Theiss*, 354 Md. 257-58, 729 A.2d at 978; *Davis*, 117 Md. App. at 403-04, 700 A.2d at 810.

130. *See* Snowhite v. State, 243 Md. 291, 308, 221 A.2d 342, 352 (1966) (stating that the Federal Rules should be used to interpret the Maryland Rules because the Maryland Rules are so closely patterned on the Federal Rules); *see also Davis*, 117 Md. App. at 401-02 & n.5, 700 A.2d at 809 & n.5 (analyzing Maryland Rule 2-415 in light of a decision made by the North Dakota Supreme Court, because the Maryland rule was substantively the same as North Dakota Rule 32(d)(3) and noting that both the Maryland and North Dakota rules are nearly identical to Federal Rule of Civil Procedure 32(d)(3)).

131. *See* JAMES & HAZARD, *supra* note 29, at 20.

132. *See* Exxon Corp. v. Comm'r, 63 T.C.M. (CCH) 2067, 2076 (1992) (stating that counsel's failure to object when a non-English speaker brought a prepared statement to deposition meant that the right to object at trial had been waived); Harvey v. Yellow Freight Sys. Inc., No. 87-1205-C, 1990 WL 171014, at *1 (D. Kan., Oct. 24, 1990) (finding that a question as to a physician's qualifications was substantive and not within Rule 32(d)).

133. 63 T.C.M. (CCH) 2067 (1992).

134. Tax Court Rule 85(d) states in full:

dispute.[135] The court in *Exxon* determined that objections as to the form of questions must be stated at the deposition or are considered waived for review at trial.[136]

When confronted with essentially the same facts as those in *Theiss*, a federal district court in Kansas ruled that when the question is whether an expert's opinion was offered within a reasonable medical certainty, the issue is not one of improper form, but instead goes to a substantive issue of whether the words "reasonable medical probability" were required to be asked in the question.[137] If the issue is a substantive one, the objection is not waived under Federal Rule 32(d)(3), even if it is not addressed during the deposition.[138]

In *Davis v. Goodman*, upon which the *Theiss* majority relied, the Court of Special Appeals used a North Dakota case to support its reasoning.[139] In *Collum v. Pierson*,[140] the North Dakota Supreme Court considered whether an objection to the foundation of an expert's testimony was sufficiently specific to allow plaintiff's counsel an opportunity to cure the error.[141] The plaintiff's attorney attempted to specify his objection as much as possible without breaching his professional obligation to his client.[142] Still, the court conclu-

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As to Manner and Form. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might have been obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

135. *Exxon*, 63 T.C.M. (CCH) at 2076.

136. *Id.*

137. *Harvey*, 1990 U.S. Dist. WL 171014, at *1.

138. *Id.*

139. Davis v. Goodman, 117 Md. App. 378, 401-03, 700 A.2d 798, 809-10 (1997) (discussing Collum v. Pierson, 411 N.W.2d 92 (N.D. 1987)).

140. 411 N.W.2d 92 (N.D. 1987).

141. The court found that the plaintiff's counsel had laid a sufficient foundation for the expert's testimony. *Id.* at 95.

142. The *Davis* court reprinted the relevant portion of the transcript from *Collum* to illustrate its interpretation of a proper objection:

Q [By Mr. Zuger—defense counsel]: The bottom line is, do you find any evidence of malpractice or negligence, if you will, whatsoever, on the part of either Dr. Lutz or Dr. Pierson in this case?

A [Dr. Eisenberg]: No.

. . . .

MR. SAEFKE [plaintiff's counsel]: We're going to object on the basis of no foundation.

MR. ZUGER: In what specific regard? He's been through the entire chart. He's read all the depositions. Where's the foundation lacking?

MR. SAEFKE: The question referred to Dr. Lutz and Dr. Pierson. You asked him whether there was any negligence on their part. My objection is there's no foundation for him to answer that question.

ded that his wording was not specific enough to sustain the objection.[143]

The North Dakota court's reasoning suggests that whether an objection is sufficiently specific is determined by whether the deposing attorney understands the grounds of the objection. With this reasoning, the court is poised at the top of a steep, slippery slope. If the defense attorney in the situation above was savvy enough to understand the basis of the plaintiff's attorney's foundational objection and had been able to cure it, the objection would have been sufficiently specific. However, if he did not understand the basis of the objection, as it appears that he did not, he could force the objecting attorney to explain his reason for objecting in painfully minute detail. Furthermore, truly savvy lawyers could take this one step further by pretending not to understand the basis for objection and forcing the objecting attorneys to articulate the entire thought process behind their objections.

The Maryland Court of Special Appeals embraced the reasoning of the North Dakota court by pointing to the linguistic similarities between the two states' statutes and by using the deposition transcript as an illustration.[144] While the North Dakota court required an extreme level of specificity, courts in North Carolina, Georgia, and Ohio also have clearly held that a general objection is not sufficient to preserve

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MR. ZUGER: And can you be more specific so I can have an opportunity to cure your objection?

MR. SAEFKE: No, I'm not going to try your lawsuit, counsel. You've been in this for some time. You know the qualifications of those gentlemen and their practices and you know the qualification of your witness and his practice. And my objection is that he is not qualified to testify as to whether there was any negligence on the part of the defendants in this lawsuit.

MR. ZUGER: And so that I have an opportunity to cure this before I conclude this deposition, where is he lacking in foundational qualifications?

MR. SAEFKE: That's not my obligation, counsel.

Davis, 117 Md. App. at 402-03, 700 A.2d at 809-10 (quoting *Collum*, 411 N.W.2d at 94).

143. *Collum*, 411 N.W.2d at 94-95.

144. *Davis*, 117 Md. App. at 401-03, 700 A.2d at 809-10. The Court of Special Appeals in *Davis* relied on the North Dakota Supreme Court's interpretation of North Dakota Rule 32 in *Collum*. *Id.* North Dakota Rule 32 is substantially similar to Maryland Rule 2-415(g). It reads in relevant part:

> Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

N.D. R. CIV. P. 32(d)(3)(B).

the issue for review at trial.[145] In *Grandy v. Walker*,[146] the North Carolina Supreme Court found that a general objection was not sufficient to preserve a matter for review unless the objection was to the testimony as a whole.[147] If counsel was objecting only to specific parts of deposition testimony, he or she must present specific objections in order to receive specific rulings at trial.[148] In *Southern Railway Co. v. Minor*[149] and *Armstrong v. Vallion*,[150] the Georgia Court of Appeals stated that a general objection is not sufficient to preserve specific issues as to the form of questions for review.[151] The *Minor* decision also noted that if counsel stated a general objection, and portions of the deposition testimony in question were relevant and admissible, the objection would be overruled, and the entire deposition would be admissible.[152]

The concurring opinion in the Ohio case of *Ward v. Herr Foods*,[153] faced with similar facts as those in *Theiss*, stated that "a general objection is not sufficient to prevent waiver of foundational errors."[154] In reaching this conclusion, the concurring judge cited Ohio Rules of Civil Procedure 32(B) and 32(D), which are similar in substance to their counterpart Federal Rules.[155] However, the concurrence also cited Ohio Rule of Evidence 103, which requires specific objections at trial, in articulating the general rule that discovery procedure should mirror trial practice.[156] This rationale would cut against the assertion that specific objections are required in Maryland depositions since the general objection is expressly permitted at trial in Maryland.[157]

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145. *See* Grandy v. Walker, 68 S.E.2d 807, 808 (N.C. 1952) (finding that general objections are permissible only when grounds exist to exclude the entire testimony); S. Ry. Co. v. Minor, 395 S.E.2d 845, 846 (Ga. App. 1990) (stating that a general objection can only be used to object to the testimony as a whole); Armstrong v. Vallion, 370 S.E.2d 215, 216 (Ga. App. 1988) (deciding that a hearsay objection must be specifically directed toward the objectionable documents presented); Ward v. Herr Foods, Inc., No. 456, 1990 WL 118868, at *15 (Ohio App., Aug. 16, 1990) (Harsha, J., concurring) (stating that "a general objection is not sufficient to prevent waiver of foundational errors").

146. 68 S.E.2d 807 (N.C. 1952).

147. *Id.* at 808.

148. *Id.*

149. 395 S.E.2d 845 (Ga. App. 1988).

150. 370 S.E.2d 215 (Ga. App. 1988).

151. *Minor*, 395 S.E.2d at 846; *Armstrong*, 370 S.E.2d at 216.

152. *Minor*, 395 S.E.2d at 846.

153. 1990 WL 118868 (Ohio App., Aug. 16, 1990).

154. *Id.* at *15 (Harsha, J., concurring).

155. Ohio Rule of Civil Procedure 32 provides that errors which could be cured if properly presented are waived unless a "reasonable" objection is made. OHIO R. CIV. P. 32(d).

156. *Ward*, 1990 WL 118868, at *15 (Harsha, J., concurring) (citing OHIO R. EVID. 103(A)(1)).

157. *See* MD. R. 5-103(a)(1) (permitting general objections at trial).

d. Practical Considerations for Practitioners.—The strength of an individual's case relies, in large part, on an attorney's ability to present it. The Rules of Professional Conduct require that attorneys represent their clients in a manner that is both ethical and competent.[158] In *Theiss*, the concurrence claimed that the majority's formulation of the Maryland deposition rules and common-law history would force better-prepared lawyers to disregard their obligation to their clients to present the best possible case.[159] According to the concurrence, these attorneys would be forced to aid their less prepared adversaries by correcting their errors at deposition.[160] If an attorney's question was incorrect, the objecting counsel would be forced to explain the grounds of the objection in such a way that the deposing counsel would understand its basis and be able to correct the question.[161] While a requirement that all objections be explained in significant detail might be advantageous for the promotion of justice among the parties, the concurring judges argued that this ideal conflicted with lawyers' professional duties to their clients.[162]

While interpretation of the various enactments and guidelines of the Maryland legislature could reasonably support the argument that general objections at depositions are sufficient to preserve the issue for appeal, it seems clear from Maryland case law that a specific objection is necessary.[163] Other state courts facing similar issues have also reasoned that the purpose of a general objection is to object to the testimony as a whole and not simply to individual questions contained within the deposition.[164] Based on the similarities between these states' relevant civil procedure rules and Maryland Rule 2-415(g), it seems likely that Maryland courts will take a similar stand in the future as to the purpose of the general objection in depositions. While it is clear from the decisions in *Davis* and *Theiss* that a general objection is not sufficient to preserve a foundational or a form question for review,

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158. MD. RULES OF PROF'L CONDUCT R. 1.3 cmt. (2000) ("A lawyer . . . may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

159. *Theiss*, 354 Md. at 264, 729 A.2d at 981 (Rodowsky, J., concurring).

160. *Id.* at 263-64, 729 A.2d at 981.

161. *Id.*

162. *Id.* at 264, 729 A.2d at 981.

163. *See Theiss*, 354 Md. at 238, 729 A.2d at 967 (requiring specific objections to the form of deposition questions); Davis v. Goodman, 117 Md. App. 378, 403-04, 700 A.2d 798, 810 (1997) (same).

164. *See* Armstrong v. Vallion, 370 S.E.2d 215, 216 (Ga. App. 1988) (stating that general objections are correct only when counsel is objecting to the entire deposition); Grandy v. Walker, 68 S.E.2d 807, 808 (N.C. 1952) (same).

these courts have not clearly articulated what would be considered a sufficiently specific objection. However, it is likely that stating "objection, form" would be sufficient to preserve the objection in depositions conducted under Maryland rules, because this is deemed acceptable in the federal courts in Maryland and has been declared to be a sufficient objection by the Rules Committee in Maryland.[165] If the deposing attorney were to ask for more clarification of the objection, the defending attorney could make the objection more specific, so long as it did not have the effect of coaching the witness.[166]

5. Conclusion.—The Court of Appeals's new interpretation of Maryland Rule 2-415(g) in *Theiss* may prove difficult for judges to utilize and nearly impossible for practitioners to predict the manner in which it will be applied. So far, the Maryland courts have faced situations in which their rule is quite easy to apply. A general objection offered in a deposition is, by definition, not specific. It clearly follows that a rule requiring specificity in deposition objections would force a general objection to be overturned. However, the courts have set no benchmark for specificity in either *Davis* or *Theiss*. It will be up to practitioners to find that line.

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165. *See supra* note 69 (explaining that the Court of Appeals will look to the federal rules as a guide for interpreting Maryland rules questions and referencing the relevant portions of the Rules Committee's note); *see also* MD. CODE ANN., RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND app. A(e), at 961 (1998) ("If requested to supply an explanation as to the basis for an objection, the objecting attorney should do so, consistent with Guideline 5(b) above."); A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 353 (1998) (arguing that the "'might have been obviated or removed' clause" of Federal Rule of Civil Procedure 32(d)(3) should lead "careful counselors . . . to protect their clients' interests by objecting to all form-of-question problems, foundation problems, and other areas in which they believe a failure to object would result in waiver.").

166. *See* Dickerson, *supra* note 165, at 347-48 (asserting that attorneys' objections must be made in a non-suggestive manner to avoid coaching the witness); *see also* MD. R. 2-415 committee note (stating that "[o]bjections should be stated as simply, concisely, and non-argumentatively as possible to avoid coaching or making suggestions to the deponent").

III. CONSTITUTIONAL LAW

A. *Preserving the Essential Balance Between the State's Sovereign Power to Condemn and an Individual's Property Rights While Limiting Condemnation Juries to Six Persons*

In *Bryan v. State Roads Commission*,[1] the Court of Appeals considered whether a landowner was constitutionally entitled to a six-person or twelve-person jury in a Maryland condemnation proceeding.[2] Relying on the 1992 amendment to Article 5 of the Maryland Declaration of Rights, and section 8-306 of the Courts and Judicial Proceedings Article of the Maryland Code that implements the 1992 amendment, the court held that a landowner is not entitled as of right to a hearing before a twelve-person panel.[3] Article 5, as amended, entitles a party in a civil proceeding to a jury of at least six persons, and section 8-306 similarly specifies that a jury in a civil action shall consist of six persons.[4] The court, in a unanimous decision, determined that eminent domain proceedings are correctly classified as "civil actions" and thus found the amended Article 5 and section 8-306 applicable.[5]

The *Bryan* court's holding revokes a Maryland landowner's traditional entitlement to a twelve-person jury in condemnation cases, a long-standing practice to be sure.[6] The decision also evinces a successful attempt to reconcile legislative intent with a permissible reading of precedent and proper application of statutory interpretation,

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1. 356 Md. 4, 736 A.2d 1057 (1999).

2. *Id.* at 5, 736 A.2d at 1058. A condemnation proceeding is an exercise of the state's power to take private property for public use upon payment of just compensation to the displaced party. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 3 (1985).

3. *Bryan*, 356 Md. at 5, 736 A.2d at 1058; MD. CONST., DECL. OF RTS. art. V (amended 1992). The 1992 amendment added paragraphs (b) and (c), and Article 5 now provides, in pertinent part:

> (a) That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six . . . .
>
> (b) The parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors.
>
> (c) That notwithstanding the Common Law of England, nothing in this Constitution prohibits trial by jury of less than 12 jurors in any civil proceeding in which the right to a jury trial is preserved.

MD. CONST., DECL. OF RTS. art. V(a)-(c); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 8-306 (1995). Section 8-306 states that "[i]n a civil action in which a jury trial is permitted, the jury shall consist of 6 jurors." *Id.*

4. MD. CONST., DECL. OF RTS. art. V(a)-(c); MD. CODE ANN., CTS. & JUD. PROC. § 8-306.

5. *Bryan*, 356 Md. at 5, 736 A.2d at 1058.

6. *See infra* notes 43-44 and accompanying text (discussing landowners' previous entitlement to twelve-person juries in eminent domain cases).

while maintaining adequate protection for property owners when the state exercises its power of eminent domain.[7] The move to six-person panels in condemnation proceedings will not have an adverse impact on the individual rights of landowners, because there is little to suggest that jury performance is demonstrably a function of jury size, and because eminent domain juries are only charged with settling the issue of damages. The majority failed, however, to articulate the fundamental importance of protecting the delicate balance between the state's power to condemn and the individual's interest in the private ownership of property.[8] Thus, the court effectively ignored an issue that is especially pivotal in the context of an eminent domain case, where the powers of condemnation so candidly illustrate the philosophical and political conflicts that are inherent in our system of governance.

1. The Case.—On July 1, 1994, the State Roads Commission of the State Highway Administration, a division of the Maryland Department of Transportation, filed a "quick take" petition, followed by a formal condemnation petition, in the Circuit Court for Montgomery County to condemn property owned by Wesley and Wona Bryan.[9] Specifically, the State attempted to take a 1866-square-foot strip of the Bryans' land in fee simple, which was needed to widen New Hampshire Avenue in Montgomery County.[10] The State also sought condemnation of a 653-square-foot strip for a revertible easement to be utilized during the construction period.[11]

The trial began on July 15, 1996, and during voir dire, the Bryans requested a twelve-person jury, pursuant to Article III, section 40 of the Maryland Constitution.[12] Section 40 grants a condemnee in an

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7. *See infra* notes 70-84 and accompanying text (discussing the *Bryan* court's consideration of precedent, statutory interpretation, and legislative intent).

8. *See infra* notes 107-107 and accompanying text (discussing the need for protection of private landowners' rights when the state exercises its power of eminent domain).

9. Bryan v. State Rds. Comm'n, 115 Md. App. 707, 709, 694 A.2d 522, 523-24 (1997). The State's "quick-take" condemnation authority permits the General Assembly to provide by law for the State Roads Commission to take immediate possession of property necessary for state highway purposes. *Id.* at 709 n.1, 694 A.2d at 523 n.1. This power is derived from Article III, section 40B of the Maryland Constitution. MD. CONST. art. III, § 40B.

10. *Bryan*, 115 Md. App. at 709, 694 A.2d at 523. An estate in fee simple comprises full ownership of the land, and the estate is transferable and inheritable. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 2.2, at 33 (4th ed. 1984).

11. *Bryan*, 115 Md. App. at 709, 694 A.2d at 523. The revertible easement grants the holder a right to temporarily use or take something from the land, but not a right of possession. CUNNINGHAM, *supra* note 10, § 8.1, at 435.

12. *Bryan*, 356 Md. at 6, 694 A.2d at 1058; *see also* MD. CONST. art. III, § 40. Article III, section 40 provides: "The General Assembly shall enact no Law authorizing private prop-

eminent domain proceeding the right to compensation awarded by a jury, but the section does not specify the precise number of people necessary for a valid panel.[13] The trial court rejected the Bryans' request, holding that a six-member jury was suitable in condemnation cases in accord with section 8-306 of the Courts and Judicial Proceedings Article.[14]

At the conclusion of trial, the jury issued an inquisition awarding the Bryans $12,800 in damages.[15] Displeased with this amount, the Bryans appealed the inquisition to the Maryland Court of Special Appeals, again asserting that landowners are constitutionally guaranteed the right to a twelve-person jury in condemnation proceedings.[16] The Court of Special Appeals rejected this argument, and the Bryans filed a writ of certiorari in the Court of Appeals, raising the same issue.[17]

The Court granted the petition for certiorari to consider whether Article III, section 40 entitled the Bryans to a twelve-person jury in their condemnation proceeding.[18]

2. Legal Background.—Throughout Maryland's history, the state's legislative and judicial branches have repeatedly considered what protections should be afforded to landowners in eminent domain proceedings.[19] At common law, there was no right to a jury trial in condemnation cases, even on the issue of damages.[20] Enacted in 1851, Article III, section 40 was the first explicit grant of the right to a

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erty, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation." *Id.*

13. MD. CONST. art. III, § 40.

14. *Bryan*, 356 Md. at 6, 736 A.2d at 1058.

15. *Id.* An inquisition is a "special verdict" entered in a condemnation proceeding by the trier of fact, which sets forth "the amount of any damages to which each defendant or class of defendants is entitled or, if the court so orders, the total amount of damages awarded or both." *Id.* at 6 n.1, 736 A.2d at 1058 n.1 (quoting MD. R. 12-208 (d)).

16. *Bryan*, 115 Md. App. at 707, 694 A.2d at 522; *see Bryan*, 356 Md. at 6, 736 A.2d at 1058.

17. *Bryan*, 115 Md. App. at 707, 694 A.2d at 522; *see Bryan*, 356 Md. at 6, 736 A.2d at 1058.

18. *Bryan*, 356 Md. at 5, 736 A.2d at 1058.

19. *See, e.g.*, Bouton v. Potomac Edison Co., 288 Md. 305, 309, 418 A.2d 1168, 1170 (1980) (noting that there was no historical common-law right to a jury in condemnation cases and that commissions of viewers or appraisers were often permitted to determine damages); Balt. Belt R.R. Co. v. Baltzell, 75 Md. 94, 108, 23 A. 74, 77 (1891) (noting that common-law juries were not required in eminent domain cases and that the legislature had often provided for the assessment of just compensation by a special jury summoned on warrant); *see also infra* note 23 and accompanying text (discussing the protections afforded to landowners in Maryland condemnation proceedings).

20. *Bryan*, 356 Md. at 9, 736 A.2d at 1060; 1 NICHOLS ON EMINENT DOMAIN § 4.104 [1] (rev. 3d ed. 1973).

jury trial in state condemnation proceedings.[21] The section did not explicitly guarantee a common-law jury of twelve,[22] but Maryland courts traditionally interpreted the section to entitle landowners to juries of at least twelve persons in eminent domain cases.[23] In 1992, however, Article 5 was amended, and section 8-306 was enacted to permit six-person juries in civil actions for the first time in Maryland.[24] The Court of Appeals has consistently treated condemnation proceedings as civil actions, and thus, Article 5 and section 8-306 appear to permit six-person juries in such cases.[25]

a. The Development of a Right to a Jury in Condemnation Proceedings.—Article 5 of the Declaration of Rights guarantees the general right to a jury trial in Maryland judicial proceedings.[26] Paragraph (a) of the Article provides, in part, that the citizens of Maryland "are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law."[27] This guarantee, however, did not apply to condemnation cases because at common law, there was no right to an ordinary jury trial in eminent domain actions, even on the issue of damages.[28] Prior to Article 5's amendment, in *Knee v. Baltimore City Passenger Railway Co.*,[29] the Court of Appeals noted that the Article's original intent was to preserve the historical common-law trial by jury "as it existed when the Constitution of the State was first adopted."[30]

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21. *Bryan*, 356 Md. at 10, 736 A.2d at 1060-61.

22. *See Baltzell*, 75 Md. at 106-07, 23 A. at 77 (holding that twenty jurors summoned on warrant were suitable to determine damages where private property was condemned to facilitate railroad construction).

23. *Bryan*, 356 Md. at 13, 736 A.2d at 1062; *see also* John J. Ghingher, Jr. & John J. Ghingher, III, *Condemnation in Maryland*, 30 MD. L. REV. 301, 323 (1970) (claiming that "[i]t was undoubtedly contemplated by the framers of article III, section 40 that the best method for protecting the property owner was to entrust the final decision as to the value of the condemned property to twelve good [sic] men and true").

24. MD. CONST., DECL. OF RTS. art. V(a)-(c) (amended 1992); MD. CODE ANN., CTS. & JUD. PROC. § 8-306 (1995).

25. *Bryan*, 356 Md. at 14, 736 A.2d at 1062; *see, e.g.*, State Rds. Comm'n v. Adams, 238 Md. 371, 374 n.1, 209 A.2d 247, 248 n.1 (1965) (noting that "[t]he procedure governing entry of judgment absolute under Rule U21 [in condemnation cases] appears identical with that governing other civil cases"); D'Arago v. State Rds. Comm'n, 228 Md. 490, 498, 180 A.2d 488, 492 (1962) (acknowledging that "[a]s in other civil cases, the instructions to the jury in a condemnation case must conform to the issues and the evidence" (citation omitted)).

26. MD. CONST., DECL. OF RTS. art. V; *Bryan*, 356 Md. at 7, 736 A.2d at 1059.

27. MD. CONST., DECL. OF RTS. art. V(a).

28. *Bryan*, 356 Md. at 9, 736 A.2d at 1060; *see also* NICHOLS, *supra* note 20, § 4.104 (1).

29. 87 Md. 623, 40 A. 890 (1898).

30. *Id.* at 624, 40 A. at 891. *Knee* did not involve a condemnation proceeding. The court examined Article 5 of the Declaration of Rights and found that Article 75, section 68 of the Code of the Public General Local Laws was constitutional, allowing courts to stay

Since there *was* no common-law right to a jury trial in condemnation cases, however, Article 5 had no application in eminent domain proceedings.[31]

Given the absence of a jury trial guarantee, the courts traditionally heard all issues in eminent domain cases.[32] This practice changed in 1851 with the enactment of Article III, section 40, the first express grant of the right to a jury in Maryland condemnation proceedings.[33] This section declares that "just compensation, as agreed between the parties, or awarded by a Jury" must be paid to the landowner whose property is to be taken for public use.[34] Notably, Article III, section 40 does not specify the number of persons that must constitute the condemnation jury.[35] Similarly, the legislative history of the 1851 Maryland Reform Convention to Revise the Constitution, at which Article III, section 40 was adopted, provides no indication of the legislature's intent to dictate that a particular number of jurors determine just compensation.[36]

In *Baltimore Belt Railroad Co. v. Baltzell*,[37] the Court of Appeals confirmed that section 40 does not require a common-law jury in eminent domain proceedings.[38] In *Baltzell*, the court considered the constitutionality of a statute authorizing the condemnation of private property to facilitate railroad construction.[39] The statute provided that if the parties could not otherwise agree, a special jury of twenty would be summoned by sheriff's warrant to meet on the premises, and the property owner and railroad company would each strike four mem-

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new trial proceedings until parties previously adjudged to pay costs fulfilled that obligation. *Id.* at 624-26, 40 A. at 891-92; *see also* Bouton v. Potomac Edison Co., 288 Md. 305, 309, 418 A.2d 1168, 1170 (1980) (noting that a principle feature of the common-law jury was that it consisted of twelve members); State v. McKay, 280 Md. 558, 568, 375 A.2d 228, 233 (1977) (noting that "one of [the jury's] tranditional [sic] elements [is] the 12-man jury").

31. *Bryan*, 356 Md. at 9, 736 A.2d at 1060; *see also Bouton*, 288 Md. at 309, 418 A.2d at 1170 (noting that there was no common-law right to a jury in condemnation cases and that it was often the practice to refer questions of damages to a commission of viewers or appraisers).

32. *See* NICHOLS, *supra* note 20, § 4.105(5) (explaining that, absent a statute providing otherwise, courts heard all issues in eminent domain proceedings because there was no common-law right to a jury in condemnation cases).

33. MD. CONST. art. III, § 40; *Bryan*, 356 Md. at 10, 736 A.2d at 1060-61.

34. MD. CONST. art. III, § 40; *see also supra* note 12 (quoting the relevant provisions of Article III, section 40).

35. MD. CONST. art. III, § 40.

36. Bryan v. State Rds. Comm'n, 115 Md. App. 707, 714-15, 694 A.2d 522, 525-26. (citing 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION 766, 784 (1851)).

37. 75 Md. 94, 23 A. 74 (1891); *see also Bryan*, 356 Md. at 10, 736 A.2d at 1060.

38. *Baltzell*, 75 Md. at 106-07, 23 A. at 77.

39. *Id.*

bers, leaving the remaining twelve to determine the amount of damages awarded.[40] The *Baltzell* court found that the statute did not violate Article III, section 40, noting that common-law condemnation juries were not required and that the legislature had frequently provided for the assessment of just compensation by a special jury summoned on warrant.[41] The court held that it was properly the legislature's duty to determine whether a common-law jury or sheriff's jury should serve, depending on which "may be most expedient and proper."[42]

Although Article III, section 40 does not explicitly require a historical, common-law jury of twelve, the Court of Appeals consistently interpreted the section to guarantee landowners juries of at least twelve persons in condemnation proceedings prior to the 1992 amendment of Article 5.[43] As early as 1891, the *Baltzell* court noted that Article III, section 40 was intended to provide "the right or privilege of a jury of twelve men in determining what compensation was to be paid."[44]

b. The Advent of Six-Person Juries in State and Federal Civil Proceedings.—From its inception in 1776 until the 1992 amendment, the jury trial clause of Article 5 preserved the historical, common-law jury as it existed when the state constitution was adopted.[45] A principle feature of this common-law jury was that it consisted of twelve persons, unless the right was waived by the consent of all parties.[46]

The 1992 Amendment added new paragraphs (b) and (c) to Article 5 and removed the guarantee of a traditional twelve-person common-law jury in civil proceedings.[47] Paragraph (b) decreased the

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40. *Id.* at 98, 23 A. at 74.

41. *Id.* at 108, 23 A. at 77.

42. *Id.*

43. *Bryan*, 356 Md. at 13, 736 A.2d 1062; *see also* Ghingher & Ghingher, *supra* note 23, at 323 (noting that the framers of Article III, section 40 intended that twelve men determine the value of condemned property).

44. *Baltzell*, 75 Md. at 108, 23 A. at 77.

45. *Bryan*, 356 Md. at 9, 736 A.2d at 1060 (citing Knee v. Balt. City Passenger Ry. Co., 87 Md. 623, 624, 40 A. 890, 891 (1898) (noting that Article 5 preserved the common-law jury as it existed when the Maryland Constitution was adopted)).

46. *Id.* (citing State v. Kenney, 327 Md. 354, 361, 609 A.2d 337, 340 (1992) (noting that "Article 5 of the Declaration of Rights does not prohibit a jury of less than 12 persons if the parties agree"); Bouton v. Potomac Edison Co., 288 Md. 305, 309, 418 A.2d 1168, 1170 (1980) (referring to a common-law jury as a "jury of twelve presided over by a judge"); State v. McKay, 280 Md. 558, 568, 375 A.2d 228, 233 (1977) (noting that Maryland had departed from English common law's traditional requirement of a twelve-man jury)).

47. MD. CONST., DECL. OF RTS. art. V(b)-(c) (amended 1992); *Bryan*, 356 Md. at 7, 736 A.2d at 1059.

required number of jurors from twelve to a minimum of six.[48] Paragraph (c) stated that nothing in the Maryland constitution prohibits trial by jury of less than twelve members in civil cases.[49] Also in 1992, section 8-306 of the Courts and Judicial Proceedings Article was enacted as a statutory provision implementing the amendment to Article 5.[50] Section 8-306 closely tracks the language of paragraph (b) of Article 5, providing that juries in civil actions shall consist of six persons.[51]

The Court of Appeals has instructed lower courts to seek guidance from federal case law in attempting to define the scope of jury trial guarantees in Maryland,[52] and federal law supports the reduction in jury size.[53] The Sixth and Seventh Amendments to the federal constitution grant the right to a jury trial in criminal cases and common-law civil suits respectively.[54] Like Article III, section 40, the Sixth and Seventh Amendments fail to specify the number of jurors required.[55] The Supreme Court held in *Williams v. Florida*[56] that the Sixth Amendment does not compel a jury of twelve in criminal cases.[57] In *Williams*, the Court noted that the common-law jury composed of precisely twelve members was a mere historical accident, of no significance to the purposes of the jury system.[58] Similarly, in *Colgrove v. Battin*,[59] the Supreme Court found that jury performance is not a function of size and held that the presence of twelve persons on a jury is not a "substantive aspect" of the jury trial guarantee of the Seventh Amendment.[60]

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48. MD. CONST., DECL. OF RTS. art. V(b).

49. *Id.* art. V(c).

50. *See* MD. CODE ANN., CTS. & JUD. PROC. § 8-306 (1995); *Bryan*, 356 Md. at 5, 736 A.2d at 1058.

51. MD. CODE ANN., CTS. & JUD. PROC. § 8-306.

52. Bryan v. State Rds. Comm'n, 115 Md. App. 707, 713, 694 A.2d 522, 525 (1997) (citing Higgins v. Barnes, 310 Md. 532, 543, 530 A.2d 724, 729 (1987); Mattingly v. Mattingly, 92 Md. App. 248, 256, 607 A.2d 575, 579 (1992)).

53. *See* Williams v. Florida, 399 U.S. 78, 100 (1970) (holding that the Sixth Amendment does not require a twelve-person jury in criminal cases); Colgrove v. Battin, 413 U.S. 149, 160 (1973) (holding that a twelve-person jury is not a substantive aspect of the Seventh Amendment's jury trial guarantee in civil cases).

54. U.S. CONST. amends. VI, VII.

55. *Id.*; *see also infra notes* 56-60 and accompanying text (discussing federal cases that hold that twelve jurors are not specifically required by the Sixth and Seventh Amendments).

56. 399 U.S. 78 (1970).

57. *Id.* at 100.

58. *Id.* at 88-90, 102. The Supreme Court refused to forever codify "a feature so incidental to the real purpose of the Amendment" and "ascribe a blind formalism to the Framers which would require considerably more evidence." *Id.* at 103.

59. 413 U.S. 149 (1973).

60. *Id.* at 157.

c. The Meaning of a "Civil Action."—Section 8-306 permits six-person juries in "civil actions," and as such, the reduction in jury size can only apply to condemnation proceedings if they may be properly classified as civil actions.[61] The Court of Appeals attempted to define the term in *Unnamed Physician v. Commission on Medical Discipline of Maryland*,[62] referencing the definitions for "civil action" as set forth in Black's Law Dictionary and Poe's Pleading and Practice.[63] The *Unnamed Physician* court held that civil actions fundamentally include all adversary proceedings before a court of law and found that a medical disciplinary hearing before a state agency was not such a proceeding.[64]

There has been no extensive discussion of the term in the specific context of eminent domain cases. The Court of Appeals, without expressly pronouncing that condemnation proceedings are not civil actions, noted that they are "special proceedings" and not "ordinary suits at law."[65] By implication, however, the court has "consistently treated condemnation proceedings as civil actions at law."[66]

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61. MD. CODE ANN., CTS. & JUD. PROC. § 8-306 (1995).

62. 285 Md. 1, 400 A.2d 396 (1979).

63. *Id.* at 8, 400 A.2d at 396; *see also* Bryan v. State Rds. Comm'n, 115 Md. App. 707, 716-17, 694 A.2d 522, 526-27 (1997) (citing *Unnamed Physician*). Noting there are many definitions of "civil action," the court first quoted *Black's Law Dictionary*, which defined the term as:

> "[a]n action wherein an issue is presented for trial formed by averments of complaint and denials of answer or replication to new matter . . . an adversary proceeding for declaration, enforcement or protection of a right, or redress, or prevention of a wrong . . . ; Every action other than a criminal action."

Unnamed Physician, 285 Md. at 7, 400 A.2d at 400 (quoting BLACK'S LAW DICTIONARY 311-12 (4th ed. 1968)). The *Unnamed Physician* court also employed the definition set forth in *Poe's Pleading and Practice*, section 46, which provides that:

> "[a] civil action may be defined to be a proceeding instituted in a court of law for the purpose of obtaining redress for a grievance in the shape of a judgment by the court. 'Action' includes all the steps by which a party seeks to enforce any right in a court of law or equity and includes an appeal taken to a court of record from the final decision of an inferior court or administrative body where such appeal is authorized by statute. 'Action' does not include a criminal proceeding . . . ."

Id. at 8 (emphasis omitted) (quoting POE'S PLEADING AND PRACTICE, § 46 (6th ed. 1970)).

64. *Id.* at 9-10, 400 A.2d at 401.

65. Bouton v. Potomac Edison Co., 288 Md. 305, 309, 418 A.2d 1168, 1170 (1980).

66. *Bryan*, 356 Md. at 14, 736 A.2d at 1062; *see, e.g.*, State Rds. Comm'n v. Adams, 238 Md. 371, 374 n.1, 209 A.2d 247, 248 n.1 (1965) ("The procedure governing entry of judgment absolute under Rule U21 [in condemnation cases] appears identical with that governing other civil cases."); D'Arago v. State Rds. Comm'n, 228 Md. 490, 498, 180 A.2d 488, 492 (1962) ("As in other civil cases, the instructions to the jury in a condemnation case must conform to the issues and the evidence.").

3. The Court's Reasoning.—In finding that a condemnation proceeding is a civil proceeding, the *Bryan* court held that a landowner is entitled to a six-person jury and not a twelve-person jury in a condemnation case, pursuant to the 1992 amendment to Article 5 and section 8-306.[67] As an initial matter, the court noted that there was no common-law right to a jury in condemnation cases and found accordingly that the Article 5 guarantee of trial by jury in civil cases according to the course of common law had no application in eminent domain proceedings.[68] The court also determined that condemnation cases are properly classified as civil actions, and it rejected the Bryans' contention that a constitutional amendment to Article III, section 40 would be required before a court could reduce the number of jurors in an eminent domain case from twelve to six.[69]

The court acknowledged that prior to the 1992 amendment, the Article 5 guarantee to a jury trial preserved the historical common-law right to a jury of twelve persons.[70] In Maryland condemnation cases, however, the constitutional right to have a jury determine just compensation originated with the constitution of 1851.[71] Although a landowner was not guaranteed a common-law jury of twelve, the *Bryan* court acknowledged that from 1851 to 1992, under Article III, section 40, a landowner was entitled to a jury of at least twelve persons in a condemnation proceeding.[72] Accordingly, the dispositive issue presented in *Bryan* was whether the 1992 amendment of Article 5 had the effect of modifying this constitutional guarantee.[73]

Answering in the affirmative, the court held that the amendment of Article 5 affecting civil proceedings was applicable to condemnation cases, which are properly considered civil actions at law.[74] Relying on the description of eminent domain cases set forth in *Bouton v. Potomac Edison Co.*,[75] the Bryans asserted that "condemnation proceed-

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67. *Bryan*, 356 Md. at 5, 736 A.2d at 1058.

68. *Id.* at 9, 736 A.2d at 1060; *see also supra* note 59 (setting forth a line of cases supporting the proposition that condemnation proceedings are properly classified as civil actions).

69. *Bryan*, 356 Md. at 13-14, 736 A.2d at 1062.

70. *Id.* at 9, 736 A.2d at 1060.

71. *Id.* at 10-11, 736 A.2d at 1060-61 (citing Balt. Belt R.R. Co. v. Baltzell, 75 Md. 94, 108, 23 A. 74, 77 (1891) (noting that the right to a jury in Maryland condemnation proceedings originated with the enactment of Article III, section 40 in 1851)).

72. *Id.* at 13, 736 A.2d at 1062.

73. *Id.*

74. *Id.* at 14, 736 A.2d at 1062.

75. 288 Md. 305, 418 A.2d 1168 (1980); *see supra* note 65 and accompanying text (discussing *Bouton* in further detail).

ings are not civil actions, but are special proceedings."[76] The court found that *Bouton*'s classification of condemnation proceedings as "special proceedings" did not preclude a finding that they are also properly considered "civil actions," and held that a six-person jury is constitutionally permissible in any proceeding in which there is a right to jury trial, except for a criminal case.[77] Finding nothing in the legislative history of the acts that amended Article 5 to indicate that condemnation cases were intended to be excluded from the amendment, the *Bryan* court noted that the Court of Appeals has "consistently treated condemnation proceedings as civil actions at law."[78] As such, the court determined that the Bryans' just compensation hearing was a civil proceeding and found that the amendment to Article 5 did indeed remove a landowner's previous entitlement to a twelve-person jury.[79]

Finally, the court also rejected the Bryans' contention that an amendment to Article III, section 40 would need to be enacted before a court could reduce the number of jurors in an eminent domain case from twelve to six.[80] Noting that the right to a twelve-person jury in a condemnation proceeding was based on Article III, section 40 and not on Article 5, the Bryans argued that the amendment to Article 5 could not by implication also amend Article III, section 40.[81] A reading of the plain language of paragraph (c) of Article 5, however, convinced the court otherwise.[82] The court noted that paragraph (c) "does not say that nothing in this *Article* prohibits trial by jury of less than 12 persons," but rather that "nothing in this *Constitution* prohibits trial by jury of less than 12 jurors."[83] Thus, the court found that this language encompassed Article III, section 40 as well as other provisions of the constitution that grant the right to a jury trial in civil proceedings, and accordingly held that a six-person jury was permissible in condemnation proceedings.[84]

4. Analysis.—In applying the amended Article 5 and section 8-306 of the Courts and Judicial Proceedings Article to eminent domain

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76. *Bryan*, 356 Md. at 13, 736 A.2d at 1062 (quoting Brief for Petitioner at 7, *Bryan* (No. 97-71)).

77. *Id.* at 14, 736 A.2d at 1062.

78. *Id.*; *see also supra* note 66 (setting forth a line of cases supporting the proposition that condemnation proceedings are properly classified as civil actions).

79. *Bryan*, 356 Md. at 13-14, 736 A.2d at 1062-63.

80. *Id.*

81. *Id.* at 13, 736 A.2d at 1062 (citing Brief for Petitioner at 10, *Bryan* (No. 97-71)).

82. *Id.*

83. *Id.* at 14, 736 A.2d at 1063.

84. *Id.* at 14-15, 736 A.2d at 1063.

proceedings, the *Bryan* court properly incorporated consideration of precedent, modes of statutory interpretation, and effectuation of legislative intent. The move to six-person panels in condemnation proceedings will not have an adverse impact on the individual rights of landowners, since there is little to suggest that jury performance is demonstrably a function of jury size, and eminent domain juries are only charged with settling the issue of damages.[85] Accordingly, the result appears to be correct; the reduction in jury size may make condemnation proceedings more efficient, and, most importantly, the necessary balance between the state's power to condemn and the individual's interest in private ownership of property should remain unaffected by the legislative enactments.[86] Yet the court neglected any express contemplation of the importance of protecting this balance, and this prudential concern should be paramount when interpreting the scope of the jury trial guarantee in the American democratic system.[87] In failing to consider the preservation of an appropriate equilibrium, the *Bryan* court effectively ignored an issue that is especially pivotal in an eminent domain case, where the state's power to condemn so candidly illustrates the philosophical and political conflicts that are inherent in our system of governance.

a. Jury Performance: Not a Function of Jury Size.—The Bryans' interest in receiving just compensation for their property was not discernibly hindered by the decreased size of the jury awarding damages, and accordingly, the result appears satisfactory. Research conducted in other jurisdictions indicates that the use of six-member jury panels in civil cases does not result in significant differences in the outcome of the proceeding or in the quality of the jury's deliberation.[88] For example, in the state of Washington, verdict distributions for 128 six- and twelve-member juries were studied in cases involving workmen's

85. *See infra* notes 88-92 and accompanying text (discussing the absence of a discernible difference in the distribution of verdicts when jury size is reduced); *infra* notes 94-105 and accompanying text (discussing in detail the role of eminent domain juries).

86. *See infra* notes 88-92 and accompanying text (discussing the increased efficiency and reduction in trial costs that has accompanied reductions in jury size in various jurisdictions).

87. *See* Charles A. Rees, *Preserved or Pickled?: The Right to Trial by Jury After the Merger of Law and Equity in Maryland*, 26 U. BALT. L. REV. 301, 343 (1997) (noting that prudential considerations involve case-by-case determinations of proper procedure based on a balancing of the benefits of a course of action against its costs).

88. REID HASTIE ET AL., INSIDE THE JURY 32 (1983) (noting that research on the effects of panel size on jury performance indicates that the use of six-member juries does not result in marked differences in outcome or deliberation quality).

compensation.[89] The studies indicated no significant differences in the distribution of verdicts for plaintiffs and defendants based on jury size.[90] Similarly, a study in the New Jersey courts examining verdict distributions and the amount of damages requested and received found that six-person juries made more efficient use of trial time; deliberations were typically shorter, and there was no substantial effect on the outcome of trial or the amount of damages awarded.[91] Similar research has been conducted in Michigan, Maine, New Hampshire, Massachusetts, and Rhode Island, again with no finding of significant variance in damages or verdict when six-member juries were impaneled, and in many instances, the median deliberation time for smaller juries was significantly lessened.[92]

Absent evidence that jury performance would be adversely affected, the move to six-person panels in condemnation proceedings is desirable. If indeed, as research indicates and the legislature suggests, a reduction in jury size will "promote 'judicial economy and efficiency' by saving local governments between 'twenty and thirty percent' in jury costs," all competing interests in eminent domain cases should be served.[93] If the state can utilize its power of eminent domain to promote the public welfare by ensuring that property is put to its highest and best use, and do so at a lower cost, without decreasing the private landowner's opportunity to receive just compensation, both public and private interests should accordingly benefit.

b. The Limited Duties of the Eminent Domain Jury.—In an eminent domain case, the question of the right to condemn is solely for the court's consideration, and the jury is charged only with determining compensation.[94] When this limited role of condemnation juries is considered, the sufficiency of six-person tribunals becomes even more evident. Unlike other actions at law, the jury in an eminent domain proceeding does not determine the final outcome of the case; often the property is already slated for condemnation when the jurors assemble in the courtroom.[95] In criminal cases, where twelve-person ju-

89. *Id.* at 33.

90. *Id.*

91. *Id.*

92. *Id.* at 33-34.

93. *See* Bryan v. State Rds. Comm'n, 115 Md. App. 707, 719, 694 A.2d 522, 528 (quoting FLOOR REPORT, SENATE JUDICIAL PROCEEDINGS COMMITTEE, S. 262-1, at 1 (Md. 1992)).

94. *See* Bouton v. Potomac Edison Co., 288 Md. 305, 309-10, 418 A.2d 1168, 1170 (1980) (noting that Article III, section 40 mandates only that juries try the issue of damages, while the issue of the right to condemn is reserved for the court's determination).

95. *See* Balt. Belt R.R. Co. v. Baltzell, 75 Md. 94, 106, 23 A. 74, 77 (1891).

ries are impaneled,[96] the jury must determine an accused's innocence or guilt, and this finding could ultimately serve as the basis for depriving an individual of his freedom.[97] The condemnation jury's task is comparatively limited, as the panel only determines the inquest of damages, while the court considers the larger issue of whether or not the taking is lawful.[98] Thus, it appears even more likely that the reduction in the size of the jury will not affect the outcome of the proceeding or unfavorably alter the balance between public and private interests, as the smaller panel considers nothing more than the value of the condemnee's property.[99]

The complexity of the condemnation jury's duties is also significantly lessened, because the panel has no burden of proof to consider in awarding compensation.[100] In typical civil actions in Maryland, the jury must determine whether the plaintiff has proven her case by a preponderance of the evidence before determining damages. In criminal proceedings, the jury must decide whether the State has proven its case beyond a reasonable doubt to properly determine whether a defendant should be convicted.[101] In this setting, each juror has a vital role as a trier of fact in determining the guilt or innocence of the defendant, and the reasonable doubt of even one member warrants acquittal.[102] Accordingly, a decreased number of jurors would, in criminal cases, upset the balance between the public interest in punishing criminal offenders and the individual defendant's interest in fairness of process and avoidance of punishment.[103] The prospect of one juror harboring a reasonable doubt would logically be diminished if the size of criminal panels were reduced. In

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96. *See Bryan*, 356 Md. at 14, 736 A.2d at 1063.

97. *See* Brief of Respondent at 11, *Bryan* (No. 97-71).

98. *Bouton*, 288 Md. at 309-10, 418 A.2d at 1170.

99. *Id.*

100. *See id.* (noting that condemnation cases are special proceedings, lacking the characteristics of ordinary civil trials, because the issue of whether to condemn is tried by the court, and the jury's role is simply to view the property in question and determine its value).

101. Johnson v. State, 227 Md. 159, 163, 175 A.2d 580, 582 (1961).

102. *See* Lambert v. State, 193 Md. 551, 558-61, 69 A.2d 461, 464-65 (1949) (noting that it is a fundamental rule that jurors in a criminal case must be satisfied of the guilt of the accused beyond a reasonable doubt before reaching a verdict of guilty).

103. *See* David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1234-35 (1979) (discussing the founders' concern for the preservation of procedural and substantive guarantees for the accused, most notably due process reasonableness, in the criminal justice system); David A.J. Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395, 1420 (1979) (stating that the criminal justice system may only enforce society's moral principles of duty and obligation within the confines of a just legal system).

eminent domain proceedings, by contrast, there is no burden of proof for the jury to consider in awarding compensation, and the members do not sit as the triers of any material fact because the future use of the condemned property has already been determined by the court.[104] In this context, six jurors are as capable of assessing property value as twelve, and the diminished size of the panel should not significantly hinder the individual's interest in receipt of just compensation.[105]

c. The State's Inherent Conflict: Promoting Public Welfare While Preserving Individual Rights in Eminent Domain Proceedings.—Condemnation cases like *Bryan* provide a useful vehicle for an examination of the proper relationship between the individual and the state.[106] Each citizen is endowed with certain individual rights, the right to ownership of property among them.[107] A system of government purportedly acts to preserve and enhance these natural rights, both for the individual and for the public good.[108] The interest of public welfare and the functional operation of the state require that private resources become public commodities in certain instances, but these exchanges are unlikely to occur voluntarily, and as such, they must be coerced.[109] Thus, the state is necessarily emboldened with the power of eminent domain.[110] Yet that power must be carefully regulated to define the terms on which exchanges will take place and to ensure the proper protection for the individual rights that the state is charged with protecting.[111]

This conflict between promotion of public good and preservation of individual rights is ascertainable in the abstract, but it is perhaps more clearly evident in concrete condemnation cases like *Bryan*. The regulated terms of exchange in that case, like all eminent domain cases, necessitated that the condemned land be converted to public

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104. *See Bouton*, 288 Md. at 309-10, 418 A.2d at 1170.

105. *See* HASTIE ET AL., *supra* note 88, at 32-34.

106. *See* EPSTEIN, *supra* note 2, at 3 (noting that eminent domain cases provide a means for determining what the state can demand of the individual citizens whom it governs and represents).

107. *Id.*

108. *See id.* at 3-4 (discussing the police power that must be vested in the state to guard against infringement on private rights).

109. *Id.* at 4-5.

110. *See id.* (discussing the necessity of the state's power of condemnation to convert private resources to public use).

111. *Id.*

use and that the Bryans receive just compensation for their loss.[112] *Bryan* required a "tragic choice" between the public need for a wider roadway and the fundamental right to ownership of property,[113] an individual right that holds a sanctified position among the guarantees of the American democratic system.[114] Once this tragic choice was made, the Bryans were unquestionably entitled to have a jury ensure that, at the least, the dispossessed owners would receive adequate compensation for their loss and deprivation of rights.[115] In attaching a dollar figure to the Bryans' loss, the jury was effectively responsible for making them whole.[116] All eminent domain juries appear to act in this sense as preservationist bodies, guarding the delicate balance between the promotion of the public good and the protection of an individual's rights in ownership of property.

Thus, condemnation juries are more than mere necessities of civil procedure. They are bodies charged with the protection of the fundamental relationship between the individual and the state that is an essential underpinning of the nation's political system.[117] Accordingly, when the legislature proposes to alter the makeup of the jury, a court should consider with trepidation the likely effect of the modifications on the continued preservation of the balance between public and private interests.

In *Bryan* then, the inherent challenges of the state's power of eminent domain warranted more than the simple review of precedent and attempt at logical statutory interpretation offered by the court. The court should have also contemplated the practical impact of its decision. The result is satisfactory, but not for the reasons presented in the opinion. The court's concern for precedent, statutory interpretation, and legislative intent is well placed,[118] but the reduction in jury

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112. *See id.* at 5 (describing the terms of exchange in eminent domain cases and the requirement of just compensation for the dispossessed property owner). The land condemned in *Bryan* was necessary to widen New Hampshire Avenue in Montgomery County. Bryan v. State Rds. Comm'n, 115 Md. App. 707, 709, 694 A.2d 522, 523 (1997).

113. *See* Rees, *supra* note 87, at 345 (noting the "tragic choice" that is required in the law when a conflict between fundamental values is presented).

114. *See Condemnation in Maryland, Research Report No. 31*, Macht, Lois, Research Division, Legislative Council of Maryland 5 (1958).

115. *See* MD. CONST. art. III, § 40B.

116. *See Bryan*, 356 Md. at 6, 736 A.2d at 1058 (noting that a jury awarded the Bryans $12,800 for their loss of property).

117. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (P. Bradly rev. ed. 1945) (1835). De Tocqueville acknowledged the jury's vital importance in preserving the balance of power between the nation's government and the nation's citizens when he noted that the American jury is "above all, a political institution, and it must be regarded in this light in order to be duly appreciated." *Id.*

118. *See Bryan*, 356 Md. at 7-15, 736 A.2d at 1059-63.

size is only satisfactory because it accords with these concerns without upsetting the balance between the state's power of condemnation and the individual interest in ownership of property. The balance is safe because jury performance is not demonstrably a function of jury size,[119] and eminent domain juries must only resolve the issue of damages.[120] The *Bryan* court failed to consider or address these issues, and in this failure, the court neglected its duty as the final, most prominent voice of stability and fairness of process.[121]

5. Conclusion.—No matter the amount of compensation awarded, condemnation proceedings are likely to be distasteful for the landowner who has been displaced. Yet, the Court of Appeals noted long ago in *Baltzell* that "all the great works of public improvements in this state, in fact nearly all the railroads and turnpike roads, have been built under powers of condemnation."[122] The statement recognizes a realization of the aim of all condemnation proceedings, namely the promotion of the public welfare by the state, through the conversion of private property to public use. The power of eminent domain provides two paradoxical portraits of representative government, "of both the functions of the state and the limitations upon its powers."[123] Though the Court of Appeals failed to consider these competing portraits in *Bryan*, the result affected should not obscure either image. In fact, in maintaining a proper balance between the state's duty to provide for the public welfare and the property rights of the individual citizen, while also effectuating the legislature's intent to promote judicial economy, the court's decision should be agreeable to all competing interests.

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119. *See supra* notes 88-92 and accompanying text (identifying similarities in verdict distributions for six- and twelve-person juries in civil cases).

120. *See supra* notes 94-99 and accompanying text (discussing the function of eminent domain juries and noting that they are summoned only to determine the amount of compensation to be awarded to the dispossessed landowner).

121. *See, e.g.*, THOMAS R. DYE & HARMON ZEIGLER, THE IRONY OF DEMOCRACY 353 (1990) (noting the prominent perception of the judiciary as a final arbiter of fairness and justice).

122. Balt. Belt R.R. Co. v. Baltzell, 75 Md. 94, 102-03, 23 A. 74, 76 (1891).

123. EPSTEIN, *supra* note 2, at 331.

B. A Failed Attempt to Completely Analyze Regulatory Takings

In *City of Annapolis v. Waterman*,[1] the Court of Appeals considered whether conditions imposed upon the Watermans' subdivision development plan by the Annapolis City Council resulted in an unconstitutional taking.[2] The conditions required the Watermans to leave part of the property in their plan undeveloped.[3] In reversing the lower court's holding, the Court of Appeals unanimously found that a taking had not occurred by subdivision exaction or by denying the owners all viable economic use of their property.[4] Although the court was correct in its holding, its analysis was incomplete. In finding that no taking had occurred by either an exaction or a *per se* regulatory taking, the court failed to address the larger category of regulatory takings, which require an ad hoc, factual inquiry into the factors that may render a government action an unconstitutional taking.[5] By applying only *per se* regulatory takings jurisprudence, the court leaves landowners at risk of being denied their property rights under the Due Process Clause of the Fourteenth Amendment if future courts continue to apply this incomplete analysis.

1. The Case.—In the mid-1970s, Mareen and Marian Waterman purchased a three-acre triangular tract of land in the City of Annapolis for the purposes of developing the land into a subdivision.[6] The

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1. 357 Md. 484, 745 A.2d 1000 (2000).

2. *Id.* at 484, 745 A.2d at 1001. The Takings Clause of the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. A taking of property results "when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property." BLACK'S LAW DICTIONARY 1467 (7th ed. 1999). The Fourteenth Amendment's Due Process Clause makes the Takings Clause applicable to the states and provides that compensation must be paid when the state takes private property for public use. *See* Chi. Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897). In *Chicago Burlington*, the Supreme Court stated:

> [A] judgment of a state court . . . whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is . . . wanting in the due process of law required by the Fourteenth Amendment . . . and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.

Id.

3. *City of Annapolis*, 357 Md. at 488, 745 A.2d at 1002.

4. *Id.* at 532, 745 A.2d at 1025. A subdivision exaction is "[a] charge that a community imposes on a subdivider as a condition for permitting recordation of the subdivision map and sale of the subdivided parcels." BLACK'S LAW DICTIONARY, *supra* note 2, at 1437.

5. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (describing the ad hoc, factual inquiry that courts must make in determining the validity of government action that does not require compensation to the owner); *see infra* notes 83-100 and accompanying text (discussing the ad hoc regulatory takings tests).

6. *City of Annapolis*, 357 Md. at 488, 745 A.2d at 1002.

tract, known as the Parkway Property, was to be subdivided and developed in three phases.[7] When the first phase was developed in 1976, the City imposed a condition on the subdivision approval that required the developer "to provide 2375 square feet of recreational space in an appropriate location as part of the future development of his remaining adjacent land *in addition to* any recreational area required by that development."[8] The second development phase took place the following year without the inclusion of the recreational space promised during the first phase.[9]

The Watermans proposed the final phase of development in 1990.[10] This final section consisted of a .87-acre parcel.[11] The proposal included plans for eight duplex units to be built on a large portion of the parcel.[12] A 5538-square-foot single-family dwelling was to be built on the smaller portion, known as Lot 1.[13] To meet the recreation requirement of the first phase, the Watermans proposed a 4598-square-foot recreational easement to run across and along the rear of the duplex units.[14]

In 1992, the City Department of Planning and Zoning (the DPZ) recommended that the proposal be denied for reasons of population density and traffic problems.[15] The Planning and Zoning Commission (the Commission) denied the proposal and recommended a reduction in the number of units in the plan.[16] The Commission also found that the recreational space created by the proposed plan did not sufficiently meet the condition of the first development phase or

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7. *Id.*

8. *Id.* (quoting *City of Annapolis*, R-20-76 (Apr. 12, 1976)). Article 66B of the Annotated Code of Maryland permits municipalities to enact subdivision controls. MD. ANN. CODE art. 66B (1957). Title 20 of the Annapolis City Code contains the City's subdivision regulations, which provide that the planning commission should not approve a plan unless it meets the provisions of Chapter 21.98, Site Design Plan Review. ANNAPOLIS, MD., CITY CODE § 20.24.170 (1996). Chapter 21.98 requires the Department of Planning and Zoning to determine if the plan meets the appropriate zoning requirements and whether the buildings, spaces, landscaping, and circulations systems are adequate, safe, and efficient. ANNAPOLIS, MD., CITY CODE § 21.98.100. To ensure that the plan meets these requirements the Department of Planning and Zoning may place conditions on the plan to approve it. MD. ANN. CODE art. 66B, § 5.04.

9. *City of Annapolis*, 357 Md. at 489, 745 A.2d at 1002.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*, 745 A.2d at 1002-03.

14. *Id.* at 490, 745 A.2d at 1003.

15. *Id.*

16. *Id.*

City Code Subdivision Regulations 20.24.130 and 20.24.150.[17] Upon appeal to the City Board of Appeals, the Commission's findings were upheld.[18]

The Watermans, seeking judicial review, brought the case to the Circuit Court for Anne Arundel County.[19] The circuit court reversed the Board's decision, reasoning that the plan met the requirements of the City Code.[20] The court then ordered the Commission to approve the plan and send it to the City Council on the issue of the recreational space requirement.[21] Prior to the lower court's reversal, the City enacted Ordinance O-2-93, which required site plans to be reviewed by the DPZ before they were approved.[22] Thus, the plan was resubmitted to the DPZ for review.[23]

Upon this resubmission, the DPZ and the Commission approved the Watermans' final development plan on the conditions that: (1) Lot 1 must not be used for the development of any residential dwelling unit; and (2) the 2375 square feet of recreational space for common use required to meet the first-phase subdivision condition must be located on Lot 1.[24]

On July 16, 1996, the Watermans sued the City of Annapolis for damages, alleging that the conditions imposed on the development of

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17. *Id.*; Brief for Appellant at 6, *City of Annapolis* (No. 37); *see also* ANNAPOLIS, MD., CITY CODE § 20.24.130 (1996) (providing that the Annapolis City Code 20.24.130 requires 3600 square feet as the minimum lot size). The DPZ found that the duplex lots would not meet minimum size requirements because of the area taken away from each lot to form the recreational space. Joint Record Extract at 233, *City of Annapolis* (No. 37). Annapolis City Code 20.24.150 refers to public sites and open spaces. ANNAPOLIS, MD., CITY CODE § 20.24.150. In reference to this section of the code, the DPZ simply stated that the proposed recreational area was "inadequate." Joint Record Extract at 233.

18. *City of Annapolis*, 357 Md. at 490, 745 A.2d at 1003.

19. *Id.*

20. *Id.* at 490-91, 745 A.2d at 1003. The circuit court interpreted the City Code to allow the inclusion of the recreational space when determining whether the lots met the requisite minimum of 3600 square feet. *Id.* The court made this determination based on Annapolis City Code section 21.74.050(D), which states that recreational space can be included when calculating the number of dwelling units permitted in a subdivision. *Id.* at 491, 745 A.2d at 1003.

21. *Id.* at 491, 745 A.2d at 1003-04.

22. *Id.* at 491-92, 745 A.2d at 1004.

23. *Id.* at 492, 745 A.2d at 1004. This resubmission was the subject of much debate between the parties. *See id.* at 492 n.3, 745 A.2d at 1004 n.3. The Watermans contended that this review violated the circuit court's order to approve the plan. *Id.* The Court of Appeals pointed out that the lower court's order was to forward the plan to the City Council "in accordance with the statutory scheme established by the City of Annapolis." *Id.* Since Ordinance O-2-93 was passed prior to this order, it was the part of the subdivision approval scheme in effect. *Id.*

24. *Id.* at 492, 745 A.2d at 1004.

Lot 1 constituted an unconstitutional taking of their property.[25] The Circuit Court for Anne Arundel County ruled in favor of the Watermans, finding that the conditions resulted in a "dedication" of Lot 1 to the City for use as a public mini-park.[26] The court held that this dedication was "not reasonably related to the needs that would be created by the subdivision."[27] The concerns the City wanted to address through this dedication were the potential traffic problems that the subdivision could encounter during peak traffic periods.[28] The court dismissed these concerns, noting that the mini-park would create at least the same amount of traffic problems as a single-family home.[29]

The City appealed to the Court of Special Appeals,[30] but before the Court of Special Appeals could review the case, the Court of Appeals granted certiorari to consider: (1) whether the conditions imposed on Lot 1 constituted a dedication; (2) whether the non-segmentation principle should be applied to the property in determining whether a taking occurred; and (3) whether the conditions constituted a taking despite the Watermans retaining economically viable use of their property.[31]

2. Legal Background.—The United States Supreme Court first recognized that states may exercise their police powers to regulate the use of private property for the protection of public health, safety, and welfare in 1889 in *Mugler v. Kansas*.[32] Thirty years later in *Pennsylvania Coal Co. v. Mahon*,[33] the Supreme Court limited this notion by recognizing that a state's exercise of its police powers to take private prop-

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25. *Id.*; Brief for Appellant at 11, *City of Annapolis* (No. 37).

26. *City of Annapolis*, 357 Md. at 492-93, 745 A.2d at 1004-05. The court concluded that the conditions imposed upon Lot 1 would not alleviate any traffic problems the development was expected to create. *Id.* at 493, 745 A.2d at 1005.

27. *Id.* at 493, 745 A.2d at 1005 (internal quotation marks omitted).

28. Joint Record Extract at 300, *City of Annapolis* (No. 37).

29. *City of Annapolis*, 357 Md. at 493, 745 A.2d at 1005. The court noted that the mini-park would exacerbate the traffic hazards for two reasons: (1) park users would create more traffic; and (2) the park's proximity to a high traffic area creates a danger to children playing in the park. Joint Record Extract at 300.

30. *City of Annapolis*, 357 Md. at 494, 745 A.2d at 1005.

31. *Id.* at 487, 494, 745 A.2d at 1001, 1005. The City presented three additional issues for the court to consider, including whether the conditions met the rough proportionality test and whether damages were calculated appropriately. *Id.* at 487-88, 745 A.2d at 1001-02. Because the court resolved the first three issues in the City's favor, it did not address the last three issues. *Id.* at 488, 745 A.2d at 1002.

32. 123 U.S. 623, 668-69 (1887) (holding that a Kansas statute, which prohibited the manufacture and sale of intoxicating liquors, was a constitutional exercise of police powers because the law served to protect the public health and safety).

33. 260 U.S. 393 (1922).

erty may "go too far."[34] The Court noted that when police powers go too far, an unconstitutional taking results, and the property owner deserves compensation.[35] In *Pennsylvania Coal*, a coal company argued that the Kohler Act, which prohibited removal of the support estate to prevent the collapse of the ground surface, resulted in an unconstitutional taking of the company's coal.[36] In weighing the public interests protected against the private losses sustained, the Court invalidated the Act because, in the Court's view, the mining rights lost were too valuable to justify the Act.[37] *Pennsylvania Coal*, however, left little direction for courts in deciding when an exercise of police powers has gone so far as to amount to an unconstitutional taking.[38]

More recently, the Supreme Court has expanded upon the principles set forth in *Pennsylvania Coal* by constructing various categories that determine which takings cases require compensation by the state.[39] The types of actions that the Court has found to amount to unconstitutional takings include exactions, permanent physical invasions, denials of all economically viable use of one's land, and other regulatory actions which require case-by-case, factual inquiries.[40] In doing so, the Court has found many government actions that amount to takings.[41] Depending on the type of action at hand, the Court makes the constitutional determination based upon an application of the relevant test.

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34. *Id.* at 415. In deciding whether the state has gone too far in the exercise of its police powers, the Court suggested that this measurement is a matter of degree which must be analyzed on a case-by-case basis, and not through the Court's creation of a generally applicable rule. *Id.* at 416.

35. *Id.* at 415.

36. *Id.* at 412. The support estate was the coal left underground after mining operations that keeps the surface structures from collapsing or subsiding. *Id.* at 412-13.

37. *Id.* at 413-14.

38. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (stating that *Pennsylvania Coal* "offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment").

39. *See id.* at 1030-31 (finding that a taking resulted when a landowner was denied the ability to construct permanent dwellings when the land was purchased for development purposes); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (finding that a taking resulted when landowners were forced to allow the public free access to their marina by dredging the land to connect their pond to a bay); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838-39 (1987) (finding that a taking resulted when reconstruction plans were conditioned on the grant of a beach easement); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438, 441 (1982) (finding that a taking resulted when an apartment-building owner was forced to allow a cable company to install cable facilities on the building).

40. *See infra* notes 74-82 and accompanying text.

41. *See supra* note 39.

a. Exactions.—Exactions, one type of action that results in a taking, are viewed as a subset of regulatory takings. Exactions require their own discrete set of tests, which a court must apply when determining the action's constitutionality. Pure regulatory takings, aside from exactions, involve different tests that are applied depending on the challenge at hand.[42]

When a landowner proposes a development plan for his or her property, the plan is normally subject to approval by a local planning board or other similar government group.[43] Local planning boards regulate the development of local land by imposing exactions on landowners who propose to develop their property.[44] These groups use exactions to maintain the development of local land so that its use coincides with the needs of the community.[45]

Exactions result when the local planning group permits a landowner's development proposal on one of two conditions: (1) part of his or her land must be dedicated to the public to serve some state interest (known as a "dedication"); or (2) a fee is paid to the public to support a state interest.[46] These conditions are imposed because the government is concerned with a public need arising from the increased population and development created by the subdivision.[47] To meet these needs, the state requires the landowner to dedicate either land or fees to the public, depending on needs the development brings about.[48] Examples of such exactions include the building of streets and parks, the installation of utilities, and the dedication of money to schools and other public facilities.[49]

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42. The applicable tests depend upon how the regulation impacts the landowner's property, and whether the landowner is challenging the regulation itself, or, instead, is challenging how the regulation was applied to the owner's particular property. *See infra* notes 83-100 and accompanying text (describing the applicable tests to apply for facial and "as applied" challenges to a regulation).

43. *See* DEVELOPMENT EXACTIONS 4 (James E. Frank & Robert M. Rhodes eds., 1987).

44. *Id.*

45. *Id.* at 4, 6.

46. *Id.* at 2. A dedication is defined as an "appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public." BLACK'S LAW DICTIONARY, *supra* note 2, at 421.

47. DEVELOPMENT EXACTIONS, *supra* note 43, at 4.

48. *Id.*

49. *See, e.g.*, Ehrlich v. City of Culver City, 19 Cal. Rptr. 2d 468, 476, 480-81 (Cal. Ct. App. 1993) (requiring a $280,000 mitigation fee and a $33,220 "in lieu of art" fee); Associated Home Builders v. City of Walnut Creek, 484 P.2d 606, 617 (Cal. 1971) (requiring a dedication of recreational space or fees); City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298, 304 (Mo. Ct. App. 1970) (requiring a dedication of streets); Divan Builders, Inc. v. Planning Bd., 334 A.2d 30, 36 (N.J. 1975) (requiring a dedication of drainage facilities).

Modern exactions law originated in *Nollan v. California Coastal Commission.*[50] In *Nollan,* the Supreme Court addressed land dedications for the first time, holding that a state commission could not grant permission to the Nollans to rebuild a house on their property when such permission was conditioned upon the transfer of a beach easement to the public without compensation.[51] The commission had required the easement condition to further its goal of providing "visual access" to the beach.[52] The Court determined that an essential nexus between the state's interest and the permit condition did not exist,[53] explaining that an essential nexus exists when the end advanced by the state is furthered as justification for the state's action.[54] Although the Court agreed that the interest the commission was trying to advance was legitimate, it found that the condition had not advanced this interest.[55] Had the commission, for example, put a height limitation on the construction permit, thus furthering the state's interest in promoting visual access to the beach, the Court more likely would have found that the essential nexus existed.[56]

In *Dolan v. City of Tigard,*[57] the Court further defined exactions law by adding another test for determining when an exaction is appropriate: not only must the exaction meet the *Nollan* "essential nexus" test, but it must also be *roughly proportionate* to the projected impacts of the proposed development.[58] In *Dolan,* the exaction established by the city met the essential nexus test.[59] The Court, however, rejected the exaction, explaining that its purpose was not roughly proportionate to the projected impact of the proposed development.[60] To meet the "rough proportionality" test, the connection between the exaction and the impacts of the development must be close enough to justify the exaction.[61] The Court noted that while "no precise mathematical formula was required . . . the city must make some sort of individual-

50. 483 U.S. 825 (1987).

51. *Id.* at 841-42.

52. *Id.* at 838.

53. *Id.* at 838-39.

54. *Id.* at 841.

55. *Id.* at 838.

56. *Id.* at 836.

57. 512 U.S. 374 (1994). In *Dolan,* the city placed a condition on the landowner's commercial development plan, requiring that she dedicate part of her property for use as a storm drainage system and as a bicycle/pedestrian pathway. *Id.* at 380.

58. *Id.* at 391.

59. *Id.* at 387-88 (finding that the city's interest in preventing flooding and decreasing traffic congestion were legitimate and further advanced by the imposed conditions).

60. *Id.* at 394-95.

61. *Id.* at 391.

ized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[62]

In both *Nollan* and *Dolan*, the conditions placed upon the owner's property required part of the property to be dedicated to the public.[63] In determining the constitutionality of an exaction, courts apply both the essential nexus and the rough proportionality tests.[64] If the exaction meets both tests, it will be considered a constitutional exercise of the state's police powers, and compensation to the landowner is not required.[65] When the exaction does not meet these tests, it will be considered unconstitutional, and the owner must receive compensation for the property he has lost as required by the Fifth Amendment.[66]

b. Regulatory Takings.—Pure regulatory takings can be divided into two categories: (1) *per se* takings; and (2) those takings requiring further ad hoc inquiry into the state interest to be advanced.[67] Regardless of the type of taking at issue, a court first must apply the principle of non-segmentation to ensure that the entire property is considered in the analysis.[68]

(1) The Non-Segmentation Principle.—A critical step in analyzing a regulatory taking claim is application of the non-segmentation principle to the landowner's property.[69] Before considering whether a regulation has resulted in an unconstitutional taking, the court must apply this principle to determine exactly what unit of property is at

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62. *Id.* (footnote omitted).

63. *See supra* text accompanying notes 50-50 (discussing *Nollan*); *supra* text accompanying notes 57-62 (discussing *Dolan*); *see also* River Birch Assocs. v. City of Raleigh, 388 S.E.2d 538 (N.C. 1990). In *River Birch*, a developer challenged the city's refusal to allow it to develop land that the city claimed the developers had set aside for recreational space for the development's residents. *River Birch Assocs.*, 388 S.E.2d at 539. Part of the developer's argument was that the recreational space did not constitute a dedication. *Id.* at 542. In agreeing with the developer, the Supreme Court of North Carolina articulated the definition of a dedication by stating that one only occurs "when the conveyance benefits the public at large and not merely a portion of it, such as the property owners within a particular subdivision." *Id.* (citing Realty Co. v. Hobbs, 135 S.E.2d 30, 36 (N.C. 1964)). The court further stated that the essence of a dedication is that it be used for the public at large. *Id.*

64. *Dolan*, 512 U.S. at 386.

65. *See id.* (explaining the two tests which must be met for the city's actions to be justified).

66. *Id.* at 385.

67. *See infra* notes 74-82 and accompanying text (describing *per se* regulatory takings); notes 83-100 and accompanying text (describing ad hoc regulatory takings).

68. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978) (stating that takings jurisprudence requires consideration of the whole parcel).

69. *See id.*

issue.[70] Thus, when considering whether a landowner's property has been taken, the entire property must be considered, not just the part allegedly taken.[71] This principle applies regardless of the manner in which the owner wishes to divide the property.[72] It is also irrelevant that the owner could sell the distinct parcel allegedly taken.[73] The Supreme Court has repeatedly applied this principle in takings cases because a crucial question in the takings analysis is whether the entire property is taken or only a portion thereof.

(2) Per Se Takings.—Per se takings result from permanent physical invasions[74] and denials of all economically viable use of the land.[75] Once the court determines that such a taking has occurred, no further inquiry needs to be made to determine the validity of the regulation.[76] The Court has held that permanent physical invasions, no matter how minute, unquestionably will require compensation to the owner.[77] This rule applies regardless of the public interest the government action may serve.[78] The Court has emphasized the importance of this holding as a protection of a citizen's right "to possess, use and dispose" of his property and the expectation that an owner will be relatively undisturbed in possessing his property.[79]

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70. *Id.*

71. *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 643-44 (1993) (holding that part of a pension plan fund taken could not be considered separate from the entire fund); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987) (holding that a coal-supported estate could not be considered a separate estate); *Penn Cent.*, 438 U.S. at 130-31 (holding that the airspace above a building could not be considered a separate parcel).

72. *See Penn Cent.*, 438 U.S. at 130-31 (dismissing the owner's argument that only the air space above the building was taken); *see also Keystone Bituminous Coal Ass'n*, 480 U.S. at 498 (dismissing the owner's argument that only the support estate was taken).

73. *See Penn Cent.*, 438 U.S. at 130.

74. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding that application of a New York law that permitted cable companies to place cable facilities in an apartment building resulted in an unconstitutional taking of the building owner's property); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (holding that the imposition of a navigational servitude on a private marina resulted in an unconstitutional taking of the marina owner's property).

75. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (finding that "when . . . a regulation . . . declares 'off limits' all economically . . . beneficial uses of land . . . , compensation must be paid to sustain it").

76. *See id.* at 1015 (citing two categories of regulatory action that are compensable regardless of the interest advanced).

77. *See Loretto*, 458 U.S. at 434-35, 438 (holding that something as small as a cable box installation constitutes a physical invasion severe enough to warrant compensation).

78. *Id.* at 426.

79. *See id.* at 435 (discussing the importance of owner's property rights and quoting *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

When a regulation results in the owner's loss of all viable economic use of the land, courts will also reward compensation to the owner without questioning the public purpose behind the regulation.[80] The Supreme Court views this type of action as a means of forcing the private owner to sacrifice all the benefits of owning his property to promote the common good.[81] Such actions will not be held constitutionally valid without compensating the owner for his loss.[82] Most regulatory takings cases, however, do not fall into either of these simple, clear-cut categories.

(3) Takings Requiring an Ad Hoc Factual Inquiry.—In cases that do not fall under the *per se* takings category, the Court has not set any specific formula to determine whether a landowner deserves compensation.[83] It has, however, articulated two sets of tests which may be applied when making this determination. One set of tests is used for "as applied" challenges; the other set applies to facial challenges. As with all regulatory takings cases, this determination revolves around an essential question: whether the land use regulation unfairly singles out a property owner, requiring him "to bear public burdens [that] . . . should be borne by the public as a whole."[84]

(i) Challenges to Regulations as Applied to an Individual Owner.—The first test involves "as applied" challenges to governmental regulation. "As applied" challenges question the validity of a regulation as it has been applied to an individual owner.[85] With such challenges, the constitutionality of a state's action is called into question despite a regulation's facial validity.[86] As articulated in *Penn Central Transportation Co. v. City of New York*, the three factors generally considered are: (1) the character of the governmental action; (2) the economic impact of the regulation; and (3) the interference with the landowner's reasonable investment-backed expectations.[87]

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80. *Lucas*, 505 U.S. at 1019.

81. *Id.*

82. *Id.*

83. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (stating that "[t]here is no set formula to determine where regulation ends and taking begins").

84. Armstrong v. United States, 364 U.S. 40, 49 (1960).

85. *See* Linda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 532 n.24 (2000).

86. *Id.*

87. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). In *Penn Central*, the Court concluded that New York City's Landmarks Law did not effect a taking, thus allowing the city to refuse the building of a fifty-story office building over Grand Central Terminal that was designated as a landmark. *Id.* The city had two goals in enacting the Landmarks Law: (1) to prevent the destruction of historic buildings and sites that could be

In the recent case of *Eastern Enterprises v. Apfel*,[88] the Court applied these three factors to the Coal Industry Retiree Health Benefit Act of 1992 (the Act),[89] which established funding for health benefits for coal industry retirees.[90] First, the Court found that the Act had a substantial economic impact on Eastern Enterprises as it deprived the company of $50 to $100 million.[91] It also found that the Act substantially interfered with Eastern's reasonable investment-backed expectations because of its retroactive nature.[92] Finally, the Court found the character of the governmental action in the application of the Act curious because it singled out Eastern to bear substantial amounts based on its past conduct.[93] Because an examination of the three factors favored Eastern's argument against the Act's validity, the Court found that the Act's application constituted an unconstitutional taking.[94]

(ii) Challenges to the Facial Validity of a Regulation.—The second ad hoc test for determining the constitutionality of a regulatory taking applies to "facial" challenges to government regulations.[95] Facial challenges claim that a regulation, in itself, is unconstitutional and would result in a taking if applied to any landowner.[96] The Court clearly set forth a two-factor test in *Agins v. City of Tiburon*.[97] The Court found that, when confronted with a facial challenge, a court must consider whether the regulation fails to substantially advance a

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used in economically productive manners; and (2) to enhance the quality of life for city residents through the preservation of cultural, historic, and architectural landmarks. *Id.* at 108; *see also* E. Enters. v. Apfel, 524 U.S. 498, 523-24 (1998) (describing the three factors most significant in determining whether a public action must be compensated for by the government); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (discussing the three factors considered when examining the constitutionality of government action); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (discussing the factors considered in making an ad hoc, factual inquiry into a takings question).

88. 524 U.S. 498 (1998).

89. 26 U.S.C. §§ 9701-9722 (1994).

90. *Apfel*, 524 U.S. at 503.

91. *Id.* at 529.

92. *Id.* at 532.

93. *Id.* at 537.

94. *Id.* at 537-38.

95. Oswald, *supra* note 85, at 532 n.24.

96. *Id.*

97. 447 U.S. 255, 260 (1980). The *Agins* case concerned the facial constitutionality of two zoning ordinances that limited the Agins' land to one-family dwellings, accessory buildings, and open-space uses. *Id.* at 257. The Court found that the ordinances substantially advanced legitimate state interests by effectively combating the perils of urbanization, long recognized as a legitimate government goal. *Id.* at 261. The ordinances also did not deny the Agins of all economically viable use of their land because they were still able to construct as many as five houses on their property. *Id.* at 262.

legitimate state interest, or denies the landowner all economically viable use of the property.[98] For a regulation to substantially advance a legitimate state interest, it must bear a "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense."[99] If a court finds that the challenged regulation does not meet the factors of this test, then the regulation will be declared a taking and therefore will be considered constitutionally invalid.[100]

(4) Regulatory Takings in Maryland.—Although Maryland courts have applied the tests that the Supreme Court has developed for both *per se* and ad hoc regulatory takings analyses, the tests unfortunately have been applied with little consistency. In *City of Baltimore v. Borinsky*,[101] the Court of Appeals held that the only way an owner could show that an unconstitutional taking had occurred was through a demonstration that all beneficial use of the property had been lost.[102] In *Borinsky*, a zoning board had refused a landowner's application to construct an office and warehouse building on her residentially-zoned property.[103] Because the board refused to grant her an exception, she claimed that her property had been unconstitutionally taken, as its present value was only half of its potential value with the exception.[104] The court found that this substantial loss or hardship did not constitute a taking, in contrast to a restriction that would result in loss of all beneficial use.[105] This was the only test the court applied, and because she failed to prove a loss of all economically beneficial use, the court upheld the zoning board's actions.[106]

Later that same year, the court found that an unconstitutional taking occurred when the enforcement of a regulation severely interfered with the owner's use or enjoyment of his or her property and resulted in substantial damages. *Stevens v. City of Salisbury*,[107] the court

98. *Id.* at 260-61.

99. Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928) (internal quotation marks omitted) (holding that an ordinance, which protected a residential district from intrusion by commercial and industrial buildings, did not substantially advance a state interest because it interfered with the natural development of, and resulting benefits to, the area).

100. *See Agins*, 447 U.S. at 260 (stating that a zoning law would effect a taking if it failed to meet the two-factor test).

101. 239 Md. 611, 212 A.2d 508 (1965).

102. *Id.* at 622, 212 A.2d at 514.

103. *Id.* at 618, 620, 212 A.2d at 512, 513.

104. *Id.* at 626, 212 A.2d at 517.

105. *Id.* at 625, 212 A.2d at 516.

106. *Id.*

107. 240 Md. 556, 214 A.2d 775 (1965).

found that portions of an ordinance requiring landowners to remove excess soil from lots and barriers more than three feet in height resulted in an unconstitutional taking.[108] The court found that these particular sections of the ordinance substantially restricted the owners' enjoyment of their property by requiring them to destroy or remove part of it.[109]

In 1982, the court recognized that a taking results from a physical invasion or an impairment upon the use of an owner's property.[110] In 1989, the court applied the ad hoc factors developed by the Supreme Court for "as applied" challenges to regulations.[111] It applied the factors, however, to a facial challenge to employee pension ordinances.[112] More recently, Maryland courts have consistently recognized physical invasions and denials of all economically viable use of the property as resulting in unconstitutional takings.[113] In *Maryland Aggregates Ass'n v. State*,[114] the court recognized the ad hoc facial challenge tests, but seemingly decided that the "denial of all economic use" theory set forth in *Lucas v. South Carolina Coastal Council*,[115] had overruled those tests.[116] However, even after the *Lucas* decision, the Supreme Court continued to apply the ad hoc "as applied" tests.[117]

3. The Court's Reasoning.—In *City of Annapolis v. Waterman*, the Court of Appeals reversed the Circuit Court of Anne Arundel County, finding that no unconstitutional taking of the Watermans' property occurred when the City placed conditions on the approval of the Wa-

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108. *Id.* at 572-73, 214 A.2d at 784.

109. *Id.* at 569, 214 A.2d at 782.

110. Andrews v. City of Greenbelt, 293 Md. 69, 76, 441 A.2d 1064, 1069 (1982).

111. Bd. of Trs. of Employees' Ret. Sys. v. Mayor of Balt., 317 Md. 72, 112-14, 562 A.2d 720, 739-40 (1989). The court had previously discussed the ad hoc factors in *Chevy Chase Savings & Loan v. State*, 306 Md. 384, 411, 509 A.2d 670, 684 (1986). However, the court did not explicitly apply the factors in that case. Instead, the court examined the character of the action and whether the owner had been deprived of all beneficial use of his property. *Id.* at 412-13, 509 A.2d at 684-85.

112. *Bd. of Trs. of Employees' Ret. Sys.*, 317 Md. at 112-14, 562 A.2d at 739-40.

113. *See* Offen v. County Council for Prince George's County, 96 Md. App. 526, 544, 625 A.2d 424, 433 (1993) (recognizing the physical invasion and denial of economical use standards in determining whether an unconstitutional taking occurred). This opinion also discussed investment-backed expectations, but held that the concept has never been determinative in any case that mentioned it. *Id.* at 555-62, 625 A.2d at 439-42.

114. 337 Md. 658, 655 A.2d 886 (1995).

115. 505 U.S. 1003, 1015-16 (1992).

116. *Md. Aggregates Ass'n*, 337 Md. at 683-86, 655 A.2d at 898-901.

117. *See* E. Enters. v. Apfel, 524 U.S. 498, 526-27 (1998) (applying the three-factor test and consequentially holding that application of the Coal Industry Retiree Health Benefit Act of 1992 resulted in an unconstitutional taking).

termans' subdivision development plan.[118] The City's conditions required that no dwelling be constructed on Lot 1 of the parcel, and that Lot 1 be used to satisfy the recreation space requirement of the first phase of development.[119]

Judge Cathell, writing for a unanimous court, began by examining the general purpose of local planning boards in regulating development.[120] The court also discussed the intent of the drafters of the Annapolis City Code in furthering the goals of the City's Department of Planning and Zoning.[121] After an examination of relevant cases, the court found that the lower court had misapplied the exaction principles.[122] The court explained that the lower court mistakenly referred to the conditions imposed upon Lot 1 as a dedication.[123] Because Lot 1 was in no way conveyed to the public, a dedication had not taken place, and, therefore, exaction principles did not apply to the takings inquiry.[124] The court supported its reasoning by comparing a similar situation in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[125] where the Supreme Court stated that the rough proportionality test "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development."[126]

The court next addressed the non-segmentation argument set forth by the City.[127] In determining whether the Watermans had lost all viable economic use of their land, the lower court considered only Lot 1.[128] Correctly applying non-segmentation jurisprudence, the court opined that, because Lot 1 was only a small piece of the parcel being developed in this phase, it should not be considered separately from the rest of the parcel in determining whether all economically

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118. *City of Annapolis*, 357 Md. at 491, 745 A.2d at 1004.

119. *Id.*

120. *Id.* at 494-96, 745 A.2d at 1005-06.

121. *Id.* at 498-99, 745 A.2d at 1007.

122. *Id.* at 519-20, 745 A.2d at 1018-19.

123. *Id.* at 503-06, 521, 745 A.2d at 1010-11, 1019.

124. *Id.* at 521-22, 745 A.2d at 1019-20. The court compared the case to *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 703 (1999), where the Supreme Court similarly found that exactions principles should not be applied in pure regulatory takings cases. The court also equated the case to *Messer v. Town of Chapel Hill*, 297 S.E.2d 632, 634 (1982), in which the local Planning Board placed conditions on a development plan that the included recreational space be relocated.

125. 526 U.S. 687 (1999).

126. *City of Annapolis*, 357 Md. at 519, 745 A.2d at 1018-19 (citing *City of Monterey*, 526 U.S. at 703).

127. *Id.* at 487, 745 A.2d at 1001.

128. *Id.* at 526, 745 A.2d at 1022.

viable use of the land was lost.[129] Upon application of the non-segmentation principle to the entire development phase, the court inquired as to the potential loss of all viable economic use of the property.[130] Because the Watermans could still develop duplexes on the remaining part of the final phase parcel, the court concluded that the Watermans had not lost all viable economic use of the third subdivision phase.[131]

Relying on the conclusions that exactions principles did not apply to the case and that the Watermans' entire third phase development parcel retained an economically viable use, the Court of Appeals reversed the circuit court's holding and found that an unconstitutional taking had not occurred.[132]

4. Analysis.—In determining whether the conditions imposed upon the Watermans' final subdivision development plan constituted an unconstitutional taking of their property, the Court of Appeals properly determined that exaction principles did not apply to the case.[133] The court was also correct in applying the non-segmentation principle to the entire final phase parcel.[134] However, in concluding that an unconstitutional taking did not occur, the court failed to consider the appropriate ad hoc factors previously set forth by the Supreme Court.[135] The ultimate question the court must answer in considering these factors is whether the state has forced the private landowner to bear a burden which should be borne by the public as a whole.[136] Although the final result was correct, the court should have applied all of the factors previously set forth in the ad hoc test to complete its analysis of the Watermans' taking claim.

a. The Correct First Steps in Analyzing the Watermans' Taking Claim.—The court properly concluded that the conditions imposed did not result in an exaction, because no dedication of the Watermans' property took place.[137] For a dedication to take place, the gen-

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129. *Id.* at 526-32, 745 A.2d at 1022-25 (discussing and applying the non-segmentation principle set forth in *Penn Central* and *Concrete Pipe*).

130. *Id.* at 526, 745 A.2d at 1022.

131. *Id.* at 532, 745 A.2d at 1025.

132. *Id.*

133. *See id.* at 521-22, 745 A.2d at 1019-20.

134. *See id.* at 526-32, 745 A.2d at 1022-25.

135. See *infra* text accompanying notes 154-157.

136. Armstrong v. United States, 364 U.S. 40, 49 (1960) (examining whether materialmen were forced to privately bear a public burden when they were denied compensation for liens attached to boat hulls that were subsequently conveyed to the government).

137. *See City of Annapolis*, 357 Md. at 520, 745 A.2d at 1019.

eral public must be a party to the transaction.[138] Lot 1's designation as recreational space, however, was not intended for public use or benefit.[139] Rather, it was intended for exclusive use by the subdivision residents, with the intention of meeting the recreational space requirements established in the first phase of the Parkway development in 1976.[140] The court viewed this as a reservation at most, but more likely as a condition.[141] Because the recreation space was not conveyed to the public, the condition could not be construed as a dedication.[142] It follows that, without a dedication, there can be no exaction.

The court correctly recognized the two appropriate *per se* categories of regulatory takings: (1) permanent physical invasions; and (2) denial of all economically viable use of the land.[143] Because the Watermans did not raise the issue, the court did not discuss whether the Watermans' property had suffered a permanent physical invasion.[144] If the court had applied the permanent physical invasion test, it probably would not have found that one had taken place, because the Watermans' property was not intruded upon in any way.[145] As required by the *Loretto* court, the conditions here did not deprive them of their rights to possess, use, or dispose of the property;[146] the City merely regulated how the Watermans may use their property.[147]

In addition, the court correctly concluded that the property was not stripped of all economically viable use through the proper application of the non-segmentation rule.[148] Unlike the situation in *Lucas*,

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138. *See id.* at 506, 745 A.2d at 1011 (quoting River Birch Assocs. v. City of Raleigh, 388 S.E.2d 538, 542 (N.C. 1990) ("There is no such thing as a dedication between owner and individuals. The public must be a party to every dedication . . . ." (internal quotation marks omitted) (quoting Jackson v. Gastonia, 98 S.E.2d 444, 447 (N.C. 1957))).

139. *Id.*

140. *Id.* at 521-22, 532, 745 A.2d at 1019-20, 1025.

141. *Id.* at 490 n.2, 745 A.2d at 1003 n.2. A "[r]eservation . . . involves no conveyance but restricts the right of the subdivider and others to use the land for anything but the restricted purpose." DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 140, at 259 (1971).

142. *City of Annapolis*, 357 Md. at 506, 745 A.2d at 1011.

143. *Id.* at 508-09, 745 A.2d at 1012-13 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-16 (1992)).

144. *See id.* at 517, 745 A.2d at 1017.

145. *See id.* at 522, 745 A.2d at 1020 (finding that the conditions only limited the Watermans' use of the property).

146. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (finding that a governmental action that amounts to a permanent physical invasion requires the government to compensate the owner); *see also supra* note 77 and accompanying text (discussing the standard set forth in *Loretto*).

147. *City of Annapolis*, 357 Md. at 522, 745 A.2d at 1020.

148. *See id.* at 526, 745 A.2d at 1022.

the Watermans were still able to develop other parts of their parcel.[149] Looking at the final development phase as a whole, the Watermans were left with the potential to reap economic benefits from a majority of the parcel for building the duplexes.[150] Because the Watermans could still receive economic benefits from their property, the minor loss they incurred was not viewed by a court as requiring compensation.[151] Every minor loss does not constitute an unconstitutional taking, because a landowner should expect that the government, at times, may be required to interfere with private property rights to protect the health, safety, and morals of the public.[152] As long as the state does not achieve this goal by depriving the owner of all economically beneficial use of his land, the action does not go so far as to effectuate an unconstitutional taking.[153]

b. The Court Stops Its Takings Analysis Short.—The court rested its decision on an application of the per se regulatory takings test.[154] The court, however, should have continued with its regulatory takings analysis. By stopping with per se takings, the court failed to make the further ad hoc, factual inquiry into other factors that may make a governmental action a regulatory taking. Although the City did not raise this issue in its brief,[155] the court still should have considered the ad hoc factors in making its final determination. By applying the ad hoc factors, the court would have set forth a complete regulatory takings analysis.[156] Only when a court applies all relevant tests for determining whether an unconstitutional taking occurred will landowners be assured that their constitutional property rights are fully protected from governmental intrusion. Without a complete applica-

149. *Id.* at 490, 745 A.2d at 1003; *see supra* notes 75, 80-82 and accompanying text (discussing *Lucas*, in which the regulations imposed upon the landowner denied him the ability to build *anything* on his entire property).

150. *See City of Annapolis*, 357 Md. at 492, 745 A.2d at 1004 (describing the conditions imposed on Lot 1). Because the conditions only applied to Lot 1, it can be inferred that the duplexes could still be built on the other part of the property. Although the DPZ and the Commission recommended that the single-family dwelling proposed for Lot 1 be relocated, the final conditions imposed by the City Council did not require its relocation. *Id.* The conditions only banned construction of a dwelling on Lot 1. *Id.*

151. *Id.*

152. *See* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (explaining that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking").

153. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

154. *City of Annapolis*, 357 Md. at 532, 745 A.2d at 1025.

155. *See id.* at 487-88, 745 A.2d at 1001-02.

156. *See* Whitney Benefits v. Peter Kiewit Sons' Co., 752 F.2d 1554, 1558 (Fed. Cir. 1985) (referring to the Supreme Court's ad hoc factual inquiries in takings cases as necessary).

tion of all appropriate tests, courts cannot adequately determine whether a landowner's property was wrongfully taken. As a consequence of such incomplete analysis, the court risks depriving landowners of their property rights by allowing the government to take their property without due compensation.[157]

The Supreme Court has clearly established the ad hoc factors to consider when determining whether a regulation's application, either facially or as applied to a particular owner, results in an unconstitutional taking.[158] In *City of Annapolis*, the court stated: "Appellant, the City of Annapolis . . . , appeals from a decision . . . which principally involves the City's subdivision approval process *as it applies* to the . . . residential development proposed by appellees . . . ."[159] Because the Watermans challenged the validity of the process as it applied to them, and not on its face, the court should have applied the three-factor "as applied" test. Not only did the court fail to apply the "as applied" test to the City's conditions, the court did not even acknowledge the test's existence. While the final ruling would have likely remained unchanged, the court should have considered the test in order to make a judicially complete decision.[160] Leaving its analysis incomplete creates further confusion for future courts in analyzing regulatory takings cases.

Applying the ad hoc factors to the Watermans' case to determine whether an unconstitutional taking occurred reveals that the City's case still would have prevailed. The first ad hoc factor focuses on the character of the government action.[161] To be constitutional, the government action needs to be "substantially related to the promotion of

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157. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (analyzing the Fifth Amendment as requiring compensation to landowners when the government takes their property for public use).

158. *See* E. Enters. v. Apfel, 524 U.S. 498, 523-24 (1998) (describing the three factors most significant in determining whether compensation is due); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (articulating the two-factor test applied when a regulation's facial validity is challenged); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (discussing the three factors considered when examining the constitutionality of a governmental action as applied to a particular individual); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (discussing the factors considered in making an ad hoc, factual inquiry into "as applied" challenges); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (describing the three-factor "as applied" test).

159. *City of Annapolis*, 357 Md. at 486, 745 A.2d at 1001 (emphasis added).

160. *See Penn Cent.*, 438 U.S. at 124 (applying the inquiries set forth by the Court in *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962), as the necessary method of determining whether a governmental action constitutes a valid exercise of police powers).

161. *Id.*

the general welfare."[162] The goal of the conditions placed on Lot 1 of the Watermans' property was to promote safety by preventing traffic and density problems that were likely to arise from use of the lot as a dwelling.[163] Looking at the Court of Appeals's statements on the conditions' effectiveness in reaching this goal, the City's action may not meet this factor. [164] Although the goal the City advanced would promote the general welfare through minimization of traffic and density problems, leaving Lot 1 undeveloped may not further that goal.[165] The City expressed concern about the traffic problems that the entire development phase would cause.[166] It is unlikely, however, that eliminating one house from the plan would have a serious impact on this problem.[167] In fact, it is more likely that the City's action may have further contributed to the traffic problem because the recreational space is just as likely, if not more so, to attract people and cars than a single house. Thus, the action does not meet the first factor of the "as applied" test.

The second factor of the "as applied" test—economic impact of the regulation—may have yielded more favorable results for the City. [168] Since the Watermans could still develop a substantial part of the final-phase parcel into duplexes because the conditions applied only to Lot 1, the economic impact of the regulation is not substantial. Requiring Lot 1 to remain undeveloped to promote the City's public safety issues hardly seems to create an economic burden on the Watermans.[169] Comparing the potential revenue generated from the entire development with the loss of profit from one lot, the economic impact is minimal.[170] Additionally, the related benefits with which the recreational park would provide the subdivision residents and the commu-

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162. *Id.* at 138. In *Penn Central*, the Court examined the character of the governmental action to find that the law did not interfere with any of the Terminal's present uses, but, quite to the contrary, that the law enabled the owners to continue to use it as it had been used for the previous 65 years. *Id.* at 136.

163. *City of Annapolis*, 357 Md. at 492, 745 A.2d at 1004.

164. *See* Joint Record Extract at 16-17, *City of Annapolis* (No. 37) (acknowledging that "the dedication of Lot One as recreational space for use as a mini-park would prove to be at least as hazardous to traffic patterns . . . as would a single family home").

165. *Id.*

166. *City of Annapolis*, 357 Md. at 492, 745 A.2d at 1004.

167. *See* Joint Record Extract at 300 (describing the City's concerns about the traffic problems that the subdivision might create).

168. *See Penn Cent.*, 438 U.S. at 124 (articulating the second factor of the "as applied" test).

169. In its brief, the City estimated that Lot 1 was valued at $40,000. Brief for Appellant at 42, *City of Annapolis* (No. 37). The value of Lot 1 was only 12% of the total value of the property. *Id.*

170. *See id.*

nity as a whole must also be taken into consideration when engaging in this analysis.[171] The park could actually increase the value of the surrounding lots, thus decreasing the Waterman's purported economic loss.[172] Finally, leaving the lot as recreational space could not create an undue burden, because the Watermans originally expected to maintain a recreational space.[173]

The final factor that should be considered by courts—interference with the landowner's reasonable investment-backed expectations—proves least helpful to the Watermans.[174] The Watermans knew that recreational space had to be included somewhere in the final development stage.[175] They also were aware that the City's codes required approval of their development plan, and that the plan's approval hinged upon its compliance with general planning and zoning principles.[176] Therefore, it was unreasonable for them to expect to be able to develop the whole property exactly as planned.[177] Because the zoning board permitted development on the remainder of the parcel, the Watermans would still receive a return on their investment even without development on Lot 1.[178]

Through application of the three-factor ad hoc test, it is apparent that the Watermans were not subjected to an unconstitutional taking

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171. Recreational spaces provide environmental benefits, recreational area, health benefits, and less density. Janice Griffith, *The Preservation of Community Green Space: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 WAKE FOREST L. REV. 563, 588, 603 (2000).

172. *See* Babin v. City of Ashland, 116 N.E.2d 580, 591-92 (Ohio 1953) (finding that landowners received adequate compensation for a dedication of parkland in the increased value the park brought to the neighboring land they owned); Lewisburg & N.R. Co. v. Hinds, 183 S.W. 985, 996-97 (Tenn. 1915) (stating that the beautification of a nearby park increased the value of the parcel of property in question, and discussing the benefits of recreational spaces).

173. *See City of Annapolis*, 357 Md. at 488, 745 A.2d at 1002. The Watermans knew that a recreational space had to be included somewhere in the final development phase, so they could not claim to have lost any ability to build where a recreational space would have been placed. *See id.* at 488-89, 745 A.2d at 1002.

174. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (stating that a governmental action's interference with a landowner's reasonable investment-backed expectations is a factor to be considered in determining the validity of the action).

175. *See City of Annapolis*, 357 Md. at 488, 745 A.2d at 1002.

176. *Id.* at 494-95, 497, 745 A.2d at 1005, 1007.

177. *See supra* note 8 and accompanying text (noting that development plans are often subject to approval by local planning boards). Regardless of whether the Watermans knew the exact requirements their plan had to meet, it was still within the discretion of the DPZ to determine the needs of the subdivision. *City of Annapolis*, 357 Md. at 495, 745 A.2d at 1005.

178. *City of Annapolis*, 357 Md. at 492, 745 A.2d at 1004 (describing the conditions imposed on Lot 1 only). Because the City approved the plan by applying the conditions only to Lot 1, it can be inferred that the remainder of the parcel could still be developed as planned. *See id.*

by the City through the conditions it imposed upon the development plan. Although the above analysis would not have changed the court's ultimate conclusion, application to different plaintiffs with a slight deviation in the given facts of their cases might yield the opposite result.

As with past cases, the court here only adds to the confusion of regulatory takings jurisprudence in Maryland.[179] Other courts have recognized the ad hoc factors, but have inconsistently applied them.[180] As a whole, the courts have habitually chosen regulatory takings tests at random and applied them with unpredictability.[181] This approach results in granting future courts great discretion in choosing whether to apply the factors or to come up with their own blend of the tests that the Supreme Court has set forth. Essentially, Maryland courts seem to be choosing the easiest, most straightforward tests to apply by coming up with their own schemes for analyzing regulatory takings.[182]

This inconsistency results in a twofold problem. First, landowners and their lawyers cannot predict which tests the court will apply in analyzing each regulatory takings case.[183] Second, if the court overlooks the appropriate tests, it may fail to recognize a situation where an unconstitutional taking has occurred. Consequentially, the landowner is more vulnerable to a denial of both due process and property rights.

Without fully analyzing the City's action in *City of Annapolis*, future courts looking to this case as precedent may deny landowners their Fifth Amendment rights. Per se takings are only one category of regulatory takings. If a landowner's claim does not fall under a per se category, the government action may still be unconstitutional through application of ad hoc factors. If a court never applies those factors, it

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179. *See supra* notes 110-117 and accompanying text (discussing the haphazard approach taken by Maryland courts when analyzing regulatory takings cases).

180. *See supra* note 111 and accompanying text (discussing Maryland cases where the ad hoc factors were mentioned, but not applied).

181. *See supra* notes 113-116 and accompanying text (describing the variations on regulatory takings analyses Maryland courts have applied).

182. *See, e.g.*, City of Balt. v. Borinsky, 239 Md. 611, 625, 212 A.2d 508, 516 (1965) (considering only whether there was a denial of all economically viable use of the land); Chevy Chase Sav. & Loan v. State, 306 Md. 384, 411, 509 A.2d 670, 684 (1986) (recognizing the appropriately applicable "as applied" factors, but instead considering the character of the action and whether all beneficial use had been denied).

183. *See, e.g.*, Stevens v. City of Salisbury, 240 Md. 556, 572, 214 A.2d 775, 784 (1965) (applying a test of restriction of the owner's enjoyment of his property to a facial challenge); Bd. of Trs. of Employees' Ret. Sys. v. Mayor of Balt., 317 Md. 72, 112-14, 562 A.2d 720, 739-40 (1989) (applying the "as applied" factors to a facial challenge).

may overlook a legitimate takings claim, thereby denying the landowner of due compensation.

For reasons of fairness, efficiency, and constitutionality, the Court of Appeals should have applied the ad hoc regulatory takings factors. Only when a regulatory takings analysis is complete, will Maryland courts safeguard the property rights of landowners.

5. Conclusion.—The Court of Appeals correctly concluded that no unconstitutional taking of the Watermans' property occurred when the City of Annapolis imposed conditions on the final phase of their subdivision development.[184] The court first found that exaction principles were irrelevant because no dedication had taken place.[185] Then the court concluded that proper application of the non-segmentation rule demonstrated that the Watermans did not lose all economically viable use of the final development parcel.[186]

However, this analysis only addressed the per se takings branch of regulatory takings. The argument fell short of a full regulatory takings analysis when the court failed to consider a combination of factors that the Supreme Court has found relevant in determining whether a regulatory taking has occurred. Although applying these factors to *City of Annapolis* would not have rendered a different result, it would have transformed the court's opinion into a more complete and thorough analysis. Future courts following this incomplete analysis face the possibility of allowing the state to unconstitutionally take private property without properly compensating the owner.

JESSICA L. STUART

184. *City of Annapolis*, 357 Md. at 532, 745 A.2d at 1025.
185. *Id.* at 525, 745 A.2d at 1021.
186. *Id.* at 532, 745 A.2d at 1025.

IV. CONTRACTS

A. An Answer to the Court of Appeals's Mistaken Finding of Breach of Contract

In *Regal Savings Bank v. Sachs*,[1] the Court of Appeals considered whether a bank had "just cause" to terminate a consultant[2] after the bank learned that the consultant had made a number of overdrafts on his personal and business accounts at the bank.[3] The overdrafts occurred at an earlier time while the consultant was serving as President and Chief Executive Officer of the bank.[4] The Court of Appeals held that the bank was not entitled to summary judgment, because there remained an issue of fact, namely, whether the consultant's overdrafts amounted to a "material" breach of his consulting contract.[5] In so holding, the Court of Appeals implied that an employee could materially breach an employment contract through actions that occurred prior to the formation of the contract.[6] This analysis was doctrinally inaccurate and consequently impossible to apply with precision to the facts of the case. *Regal Savings Bank* was a case of mistake, not one of breach. In deciding the outcome of this case, the Court of Appeals simply should have determined which of the parties could have avoided the mistake at the least cost at the time of contract formation.

1. The Case.—In 1976, Stewart Sachs was hired as the managing officer of a state savings and loan association that eventually evolved into Regal Savings Bank (the Bank).[7] Under Sachs's leadership, the Bank grew very quickly, converting from a mutual association to a stock company in 1981.[8] Sachs was eventually elected president, CEO, and director of the Bank.[9] Sachs was also elected president and director of Regal Bancorp., Inc., the Bank's corporate parent.[10]

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1. 352 Md. 356, 722 A.2d 377 (1999).
2. *Id.* at 363, 722 A.2d at 380.
3. *Id.* at 361, 722 A.2d at 379.
4. *See id.* at 360-61, 722 A.2d at 379.
5. *Id.* at 372-73, 722 A.2d at 384-85.
6. *See infra* notes 121-125 and accompanying text (explaining that the alleged breach occurred prior to contract formation).
7. *Regal Sav. Bank*, 352 Md. at 357, 722 A.2d at 377.
8. *Id.* Sachs increased Regal Savings Bank's assets and net worth considerably. *See id.* at 358, 722 A.2d at 378. In 1976, the Bank had assets of $800,000 and no net worth. *Id.* In 1993, when Sachs was forced to resign, the Bank held assets of $40 million and had a net worth of close to $6 million. *Id.*
9. *Id.* at 357, 722 A.2d at 377.
10. *Id.* Sachs also served as an officer and director of five subsidiaries owned by Regal Bancorp. *Id.*

Two developments occurred that depleted Sachs's enthusiasm for working for the Bank. First, starting in 1986, he began to focus more time on personal business pursuits.[11] Second, as the Bank grew from a savings and loan association to a stock company, and then into a savings bank, the Bank became increasingly subject to federal regulations.[12] Sachs did not adjust well to the strict scrutiny of federal regulations;[13] in fact, he became agitated and openly hostile to the supervision.[14]

In early 1993, Sachs decided to resign as president of the Bank.[15] As a result, the Bank began a search for a new president and CEO to run its day-to-day operations.[16] On March 8, 1993, Sachs formally tendered his resignation as president and CEO of Regal Savings Bank.[17] The Board of Directors (the Board) accepted the resignation at a special meeting on March 18, 1993.[18] At that meeting, the Board agreed that Sachs would remain in his current positions with the Bank's parent corporation, Regal Bancorp., and would serve as a consultant to the Bank.[19] As compensation, Sachs would continue to receive his

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11. *See id.* at 358, 722 A.2d at 378. Sachs's other businesses included mortgage lending, equipment leasing, and investments in real estate. *Id.* In 1986, Sachs and a twenty-five percent stockholder created another bank, which attracted investors from the board of Regal Bancorp. *Id.*

12. *See id.* at 359-60, 722 A.2d at 378; *see also* Sachs v. Regal Sav. Bank, 119 Md. App. 276, 279, 705 A.2d 1, 2 (1998) (acknowledging the Bank's increasing vulnerability to regulations and explaining further that "[t]he savings and loan crisis in the 1980's . . . led to increased federal regulation and supervision").

13. *See Regal Sav. Bank*, 352 Md. at 360, 722 A.2d at 378.

14. *Id.* Sachs repeatedly dismissed the federal regulations as "bull****" during his deposition. *Id.* The Court of Special Appeals perhaps best described Sachs's reaction to the regulations: "Both appellant [Sachs] and appellee agree that it was not simply a case that the appellant found it difficult to operate within the highly regulated environment that the banking industry had become. It was rather the case that the appellant was openly and almost belligerently disdainful of such regulations." *Sachs*, 119 Md. App. at 279-80, 705 A.2d at 2.

15. *Regal Sav. Bank*, 352 Md. at 360, 722 A.2d at 378. A number of factors led Sachs to this decision. *Id.* Sachs felt that the Board of Directors of the Bank was uncomfortable with his outside business activity and that many of the directors were worried about personal liability that might result from his conduct. *Id.*, 722 A.2d at 378-79. He also felt that the board wanted someone to whom federal regulators would be less hostile. *Id.*, 722 A.2d at 379. Finally, Sachs grew increasingly annoyed with the "number two operating officer" of the Bank, Allen Holzman, who had been questioning Sachs about conflicts of interest developing as a result of his outside business activities. *Id.*

16. *Id.*, 722 A.2d at 379. The Board of Directors planned for Sachs to continue to be responsible for the Bank's business development and for the management of Regal Bancorp. and its subsidiaries. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

current salary and benefits for a period of two years, beginning April 1, 1993, and ending March 31, 1995.[20]

On March 29, 1993, the Bank's independent auditors informed the Board that Sachs, members of Sachs's family, and entities owned by Sachs or his secretary had incurred a number of overdrafts in twenty-four accounts at the Bank.[21] Further, no charges or interest had been assessed in connection with any of the overdrafts.[22] On April 2, 1993, two of the Bank's directors spoke with Sachs about the overdrafts.[23] He did not take issue with the auditors' findings.[24] As a result, the Board demanded that Sachs resign from all of his positions with Regal Bancorp. and its subsidiaries.[25] Sachs gave the Board his resignation, which became effective April 2, 1993.[26]

Sachs brought suit against Regal Savings Bank and Regal Bancorp. in the Circuit Court for Baltimore City, alleging that the Bank and Regal had breached the contract to employ him as a consultant for two years.[27] Following discovery, both defendants moved for summary judgment.[28] The defendants argued that Sachs's conduct violated federal banking law and the Bank's own policies, and

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20. *Id.* Sachs's salary at the time he resigned was $127,000 per year. *Id.* The minutes of the Board meeting memorialized the new contract between Sachs and the Bank:

> The Board accepted the resignation of Stewart D. Sachs as President of Regal Savings Bank, FSB. Mr. Sachs will retain his position as President and Chief Executive Officer of Regal Bancorp and will also remain as a member of the Board of Regal Savings Bank, FSB. Mr. Sachs' salary and benefits will continue to be paid for a period of two years ending March 31, 1995. During this time Mr. Sachs will serve as a consultant to the Bank so that the Bank may utilize the experience accumulated by Mr. Sachs during the years that he was President. Duties performed by Mr. Sachs on behalf of other subsidiaries of Regal Bancorp will be charged to those operations accordingly.

Sachs v. Regal Sav. Bank, 119 Md. App. 276, 280-81, 705 A.2d 1, 3 (1998) (quoting the minutes of the March 18, 1993, Board of Directors Meeting).

21. *Regal Sav. Bank*, 352 Md. at 361, 722 A.2d at 379. The number of overdrafts was rather extensive. The auditors later reported that there was a total of 799 overdrafts on these accounts from January 1992 through March 1993. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 361-62, 722 A.2d at 379.

26. *Id.* at 362, 722 A.2d at 379. The Board accepted Sachs's resignation at a meeting held April 2, 1993. *Id.* The minutes of the meeting concerning Sachs's resignation read:

> "The action was prompted by the Board becoming aware of deviations in the policies and procedures relating to overdrafts in employee checking accounts. Specifically, accounts controlled by or associated with Mr. Sachs and/or his secretary . . . . The Board voted to rescind Mr. Sachs' two year consulting agreement as detailed in its resolution of March 18."

Id., 722 A.2d at 379-80.

27. *Id.* at 362, 722 A.2d at 380.

28. *Id.*

thus constituted just cause to terminate Sachs's employment.[29] The circuit court agreed with the defendants, and granted their motion for summary judgment.[30]

The Court of Special Appeals reversed the circuit court's decision,[31] reasoning that, although no dispute as to the material facts of the case existed, "there was a genuine and material dispute as to the significance of those facts."[32] The court explained that "a jury could conceivably have found that the actions of the appellant prior to becoming a consultant did not represent a material breach of his consulting contract and that the Bank, therefore, did not have just cause to terminate his services as consultant."[33] In support of its holding, the court suggested that a jury could find either that Sachs's overdrafts as president had nothing to do with his consulting contract or that the Bank knew of his overdrafts all along.[34] If a jury came to either conclusion, Sachs would not have materially breached the consulting contract.[35]

The Court of Appeals granted the defendants' petition for certiorari to consider whether the Court of Special Appeals had erred in reversing the circuit court's grant of summary judgment on the grounds that there was good cause for the Bank to terminate Sachs's employment as a consultant based on his overdrafts while serving as the Bank's president.[36]

2. Legal Background.—It is a well-settled doctrine that a party who commits a material breach of a contract may be denied future compensation under the contract.[37] In accordance with this doctrine,

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29. *Id.*

30. *Id.*

31. Sachs v. Regal Sav. Bank, 119 Md. App. 276, 288, 705 A.2d 1, 7 (1998).

32. *Id.* The Court of Special Appeals explained that trial court judges often err in deciding summary judgment motions by failing to resolve all inferences against the moving party. *Id.* at 286, 705 A.2d at 6. The court explained that, under the influence of this misguided propensity, "it would be easy to leap to the other extreme and to conclude that summary judgment should actually have been entered in favor of the Bank." *Id.*

33. *Id.* at 288, 705 A.2d at 6.

34. *Id.* at 287, 705 A.2d at 6.

35. *See id.* at 288, 705 A.2d at 6-7.

36. *Regal Sav. Bank*, 352 Md. at 363, 722 A.2d at 380.

37. *See* E. ALLEN FARNSWORTH, CONTRACTS § 8.15, at 633 (2d ed. 1990) (explaining that courts allow "the injured party to suspend performance only if the breach is *material*, that is, sufficiently serious to warrant this response"); *see also* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 237 (1979) ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

the Court of Appeals of Maryland has consistently held that an employer may withhold future compensation due under an employment contract from an employee who materially breaches that contract.[38] This Section will review the common-law history of this rule in Maryland and describe how the Court of Appeals has defined and applied the concept of "material breach."

a. Denial of Future Compensation as a Result of a Material Breach of Contract.—One of the first cases decided by the Court of Appeals dealing with the denial of compensation due to material breach was *Schneider v. Hagerstown Brewing Co.*[39] In *Schneider*, the Hagerstown Brewing Company hired Thomas J. Schneider as its brewmaster for a period of five years.[40] Schneider's compensation included cash and stock in the company.[41] After three years, Schneider quit the company and sued for the par value of stock shares to which he felt he was entitled at the end of the year.[42] The Court of Appeals first determined that by leaving the company, Schneider "committed a breach of his contract of employment."[43] The court explained that this breach of contract prevented Schneider from claiming "any of the stipulated compensation *except that which had previously accrued.*"[44] The court further stated that Schneider's "assertion of any other rights under the agreement . . . was clearly debarred by his own default in the performance of his contractual duty."[45] Thus, under *Schneider*, an employee who breaches his contract is barred from claiming benefits arising after the breach.

Thirty-six years later, the Court of Appeals reaffirmed this rule in *Shipley v. Meadowbrook Club, Inc.*[46] In *Shipley*, an employee brought suit against his former employer for allegedly withholding four shares of preferred stock due to the employee under the terms of his employment contract.[47] The employer counterclaimed, alleging that the em-

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38. *See Regal Sav. Bank*, 352 Md. at 363, 722 A.2d at 380 (citing St. Paul at Chase v. Mfrs. Life Ins. Co., 262 Md. 192, 217-18, 278 A.2d 12, 25 (1971); Md. Credit Fin. Corp. v. Hagerty, 216 Md. 83, 92, 139 A.2d 230, 234 (1958)).

39. 136 Md. 151, 110 A. 218 (1920).

40. *Id.* at 152, 110 A. at 218.

41. *Id.* at 152-53, 110 A. at 218.

42. *Id.* at 153, 110 A. at 218.

43. *Id.*

44. *Id.* (emphasis added).

45. *Id.* at 153-54, 110 A. at 218.

46. 211 Md. 142, 126 A.2d 288 (1956).

47. *Id.* at 145-46, 126 A.2d at 289. Mr. Shipley was hired as a general manager of the Meadowbrook Swimming Pool by Mr. Roberts and Mr. Steiber in February 1945. *Id.* at 146, 126 A.2d at 290. All of the stock in the corporation was owned by Mr. Roberts and Mrs. Steiber. *Id.* Shipley testified that his compensation was $4100 in cash per year, plus one

ployee should not receive any further compensation because, after his employment was terminated, the employee wrongfully converted a promissory note and three shares of stock that he had previously given to the employer.[48] The employer further alleged that the employee wrongfully appropriated materials owned by the employer, wrongfully utilized the services of a workman employed by the employer, and made charges against the employer for personal telephone calls.[49] In announcing its rule of law, the court stated, "[w]e accept the general principle that an agent who is guilty of fraud upon his principal, particularly where there is a conflicting interest, concealment, or a willful and deliberate breach of his contract, may be denied compensation for his services."[50] The court decided, however, that this rule was not applicable to the facts of the case.[51]

The court found that the *Shipley* rule was applicable two years later in *Maryland Credit Finance Corp. v. Hagerty*.[52] In *Hagerty*, the Maryland Credit Finance Corporation (MCFC), an automobile financing company, promoted Edward Hagerty to branch manager of their Wil-

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share of the preferred stock of the corporation at the end of each year. *Id.* In the summer of 1947, Shipley bought a house and Mr. Roberts and Mr. Steiber agreed to lend him $3000. *Id.* at 147, 126 A.2d at 290. Shipley agreed that the three shares of stock previously issued to him were to be used as collateral. *Id.* Both Shipley's promissory note and the three shares of stock were placed in the safe at Meadowbrook Swimming Pool. *Id.* Shipley also testified that he requested that Mr. Steiber issue him additional shares at the end of each succeeding year, but "Mr. Steiber always put him off with the statement that it would 'be taken care of.'" *Id.* In January 1952, Shipley was fired, and he again demanded that the corporation issue him the four shares of stock that had accumulated under the terms of his employment contract. *Id.* When the shares were not issued, Shipley returned to the pool and took the promissory note and the three shares of stock out of the safe. *Id.*

48. *Id.* at 146, 126 A.2d at 289. Mr. Roberts wrote Shipley a letter requesting the return of the stock and promissory note in September 1952. *Id.* at 147, 126 A.2d at 290. Mr. Steiber testified that he did not owe Mr. Shipley any shares of stock, because the issuance to Mr. Shipley of the stock shares was not part of the employment contract. *Id.* The shares were given to Shipley as a bonus at the end of the year—"a friendly gesture" on the part of the Stiebers. *Id.*

49. *Id.* at 146, 126 A.2d at 289. Shipley allegedly took plumbing tools and grass seed owned by the corporation. *Id.* at 148, 126 A.2d at 290-91. Further, the corporation alleged that Shipley had billed it for $250 worth of wood and $190 worth of pipe that Shipley had used for repairs on his own house. *Id.* Shipley also admitted that he had used another employee of the corporation to help him remodel his house in the winter when the pool was closed and to cut grass during the summer months. *Id.*, 126 A.2d at 291. The telephone calls totaled $9.40, and most were identified as business calls. *Id.*

50. *Id.* at 148, 126 A.2d at 291.

51. *Id.* at 148-49, 126 A.2d at 291. The court found the rule inapplicable because "the evidence shows that the irregularities were waived or condoned." *Id.* at 149, 126 A.2d at 291.

52. 216 Md. 83, 139 A.2d 230 (1958).

mington, Delaware branch.[53] Hagerty was employed under an oral, at-will employment contract, and his compensation included a fixed monthly salary plus an annual bonus.[54] Two years after Hagerty was promoted, the home office noticed that repossessions and payment delinquencies were running abnormally high at the Wilmington branch.[55] After an investigation and demands for changes in the way he ran the Wilmington office, Hagerty resigned.[56] MCFC eventually learned that Hagerty had entered into a number of business arrangements with car dealerships that did business with MCFC.[57] Hagerty never received his year-end bonus and filed suit for the recovery of that bonus.[58] The Court of Appeals determined that Hagerty's outside activities amounted to a willful, material breach of his employment contract.[59] The court restated the rule announced in *Shipley* that "[w]here the breach of duty by the employee was wilful and material . . . the Courts have held consistently that the employee has forfeited at least compensation which has not already been earned."[60]

Following *Schneider*, *Shipley*, and *Hagerty*, it is clear that if an employee materially breaches his or her employment contract, the em-

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53. *Id.* at 86, 139 A.2d at 231. Hagerty had a great deal of freedom in the way he chose to run his branch office. *See id.* He had the power to hire and fire subordinates. *Id.* Further, he had direct responsibility for purchasing conditional sales contracts. *Id.* Hagerty's branch also handled wholesale financing, and Hagerty conducted regular checks to ensure that no dealer exceeded the maximum limitation on advances, and to make sure that no car was delivered to a customer until the dealer had paid MCFC its advance against the car. *Id.*

54. *Id.* at 86-87, 139 A.2d at 231.

55. *Id.* at 87, 139 A.2d at 231.

56. *Id.* at 87-88, 139 A.2d at 231-32. The home office assumed general supervision of the Wilmington branch after unsuccessful efforts to have Hagerty correct the problems. *Id.* at 87, 139 A.2d at 231. MCFC demanded that Hagerty dismiss his wife as office manager and that a home office crew be placed in the Wilmington office until the branch was again on stable financial footing. *Id.*, 139 A.2d at 232. Hagerty agreed to fire his wife, but refused to accept the latter requirement. *Id.* He also asked if he would receive his year-end bonus if he resigned. *Id.* Hagerty was told that he would receive whatever compensation was due to him. *Id.* at 87-88, 139 A.2d at 232.

57. *Id.* at 88, 139 A.2d at 232. Hagerty was supervising one of the car dealerships and was receiving one-third of the monthly profits. *Id.* The trial court determined that MCFC had lost $1000 on contracts with this dealership and that Hagerty was directly responsible for twenty-five percent of these losses. *Id.* Hagerty had also borrowed $1500 from another car dealership. *Id.* at 88-89, 139 A.2d at 232. These two dealerships "were among [MCFC's] worst accounts with respect to delinquencies, repossessions and missing title certificates." *Id.* at 89, 139 A.2d at 232.

58. *Id.* at 89, 139 A.2d at 232.

59. *Id.* at 92, 139 A.2d at 234. The court reasoned that Hagerty violated the implied duty of loyalty that every employee owes to his or her employer, and that a violation of this duty amounts to a material breach of contract. *Id.* at 90-91, 139 A.2d at 233-34.

60. *Id.* at 92, 139 A.2d at 234.

ployer has the right to deny the employee the future compensation due under the contract.

b. What Amounts to a Material Breach of Contract?—Maryland case law also contains a well-established rule of what amounts to a material breach of contract. In *Ady v. Jenkins*,[61] the plaintiff and the defendant contracted for the sale of a pack of canned corn.[62] The defendant promised to ship the corn to the plaintiff in return for cash.[63] The plaintiff also promised to deliver labels to the defendant before the corn was shipped.[64] The defendant argued that since the plaintiff never delivered the labels, he had breached the contract, relieving the defendant from his obligations.[65] The Court of Appeals responded, stating that "[t]he law is well settled that when there has been a substantial breach of a contract, the other party has a right to rescind the contract or to refuse to perform his part, and sue for damages."[66] The court further explained that not every breach permits the other party to rescind the contract.[67] Only those breaches that "go to the root of the matter, defeating the object of the contract" amount to a material breach.[68] Applying this rule, the court reasoned that the plaintiff had not materially breached the contract.[69] As a result, the court affirmed the trial court's decree for specific performance.[70]

In *Speed v. Bailey*,[71] the Court of Appeals applied the rule of material breach when the plaintiff attempted to rescind a contract for the construction of a house and to recover an initial down payment.[72] In

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61. 133 Md. 36, 104 A. 178 (1918).

62. *Id.* at 37, 104 A. at 178.

63. *Id.*

64. *Id.*

65. *See id.* at 38, 104 A. at 178.

66. *Id.*, 104 A. at 178-79 (citing Anvil Mining Co. v. Humble, 153 U.S. 540 (1894); Koch v. Wimbrow, 111 Md. 22, 73 A. 896 (1909)).

67. *Id.*, 104 A. at 179 ("'It is not, however, every breach of contract, or failure exactly to perform, which justifies a rescission.'" (quoting WILLIAM T. BRANTLY, BRANTLY ON CONTRACTS 415 (2d ed. 1912))).

68. *Id.* (quoting BRANTLY, *supra* note 67, at 415).

69. *Id.* at 39, 104 A. at 179 ("[W]e cannot hold, under the facts of this case, that the failure of the plaintiff to deliver the labels by the 1st of August was such a breach of the contract as to justify the defendant in rescinding and abandoning the contract.").

70. *Id.* at 41, 104 A. at 180.

71. 153 Md. 655, 139 A. 534 (1927).

72. *Id.* at 661-63, 139 A. at 537. In *Speed*, the defendant sold the plaintiff a lot of ground in Baltimore County and agreed to finish building a two-room "bungalow" in accordance with the plans of the architect. *Id.* at 657, 139 A. at 535. Further, there was an exchange of letters between the two parties. *Id.* at 658, 139 A. at 535. The letter from the plaintiff to the defendant contained verbal modifications of the written contract and a

announcing the applicable rule of law, the Court of Appeals further clarified what was meant by a material breach. Again, the court stated, "'[i]t is not every partial failure to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once.'"[73] In order for a party to abandon their obligations under a contract, the failure of the other party to perform "'must be a total one—the object of the contract must have been defeated or rendered unattainable by his misconduct or default.'"[74] The court further clarified what was meant by a "total" failure, stating that, "'the act failed to be performed must go to the root of the contract, or the failure to perform the contract must be in respect to matters which would render the performance of the rest [of the contract] a thing different in substance from that which was contracted for.'"[75]

Thus, according to *Ady* and *Speed*, two things must occur for a breach to be "material." First, there must be a failure to perform when performance is due.[76] Second, that failure to perform must defeat the object of the contract, making the performance of the rest of the contract substantially different from what the parties originally bargained for.[77]

In *Foster-Porter Enterprises v. De Mare*,[78] the Court of Appeals held that the doctrine of material breach is a default term in all contracts in the state of Maryland.[79] That is, the remedy for material breach is always available to contracting parties, unless the contract exclusively

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complaint that the defendant had failed to complete the building according to the verbal modifications. *Id.* The letter from the defendant acknowledged that certain things had not been done, but also denied that certain specifications alleged by the plaintiff were ever agreed to as verbal modifications. *Id.* The plaintiff brought an action to rescind the contract and recover his initial payment on the theory that the defendant had breached the contract. *Id.*, 139 A. at 535-36. The Court of Appeals determined that to resolve the question, it had to determine whether the defendant substantially performed the contract. *Id.* at 661, 139 A. at 537.

73. *Id.* at 660, 139 A. at 536 (quoting 6 WILLIAM M. MCKINNEY & BURDETT A. RICH, RULING CASE LAW § 311 (1915)).

74. *Id.* (quoting 6 MCKINNEY & RICH, *supra* note 73, § 311).

75. *Id.* (quoting 6 MCKINNEY & RICH, *supra* note 73, § 311). Applying this rule to the facts of the case, the Court of Appeals determined that the defendant had substantially performed, and, as a result, the plaintiff could only sue for the damages he sustained from the breach. *Id.* at 663, 139 A. at 537.

76. *Id.*

77. *Id.*

78. 198 Md. 20, 81 A.2d 325 (1951).

79. *Id.* at 36, 81 A.2d at 333 (explaining that "[u]nless a contract provision for termination for breach is in terms exclusive, it is a cumulative remedy of termination for 'a breach which is material, or which goes to the root of the matter or essence of the contract'" (quoting WALTER H.E. JAEGER, WILLISTON ON CONTRACTS § 842 (rev. ed. 1962))).

defines what amounts to a breach between the parties.[80] In *De Mare*, the plaintiff and defendant entered into a contract whereby the plaintiff would be the exclusive distributor of the defendant's mechanical pitching arms for a select geographical region.[81] The contract contained a clause expressly describing what constituted a breach of the agreement.[82] Some time after the formation of the contract, the defendant determined that the plaintiff breached part of the contract by either failing or refusing to make sales of the pitching arms.[83] As a result, the defendant wrote a letter to the plaintiff informing him that the contract was terminated.[84] The plaintiff claimed that the defendant could not terminate the agreement without complying with the express provision in the contract stating what constituted a breach.[85] The defendant argued that the agreement did not apply to the type of breach alleged.[86] Unable to agree with either contention, the Court of Appeals stated that "[u]nless a contract provision for termination of breach is in terms exclusive, it is a cumulative remedy and does not bar the ordinary remedy of termination for 'a breach which is material.'"[87]

3. The Court's Reasoning.—In *Regal Savings Bank v. Sachs*, the Court of Appeals affirmed the Court of Special Appeals's holding that the circuit court erred in granting summary judgment for the defendants.[88] Writing for a unanimous court, Judge Rodowsky stated that the Court of Special Appeals "correctly identified the principal issue to be the materiality of any misconduct in which Sachs was proved to have engaged as president of the Bank to his employment as a consultant."[89] The Court of Appeals set forth the rule that "[f]or the breach

80. *See id.*

81. *Id.* at 26, 81 A.2d at 328.

82. *Id.* at 27, 81 A.2d at 329.

83. *See id.* at 28-29, 81 A.2d at 330. The trial court determined that the plaintiff had not breached the contract. *See id.* at 24, 81 A.2d at 327-28. Because of conflicting testimony, the Court of Appeals was not convinced that the trial court made an incorrect decision. *Id.* at 37, 81 A.2d at 334.

84. *Id.* at 28, 81 A.2d at 329.

85. *Id.* at 36, 81 A.2d at 333.

86. *Id.*

87. *Id.* (citation omitted) (quoting JAEGER, *supra* note 79, § 842). The court further clarified that, "[i]f plaintiff had committed a material breach of his contract, [the party not in breach] could have terminated the contract without regard to the provisions [of the part of the contract dealing with what constituted breach]." *Id.* Also, "[u]nder [the provision of the contract describing breach] the contract could be terminated for a breach of obligation which did not amount to a material breach." *Id.*

88. *Regal Sav. Bank*, 352 Md. at 357, 722 A.2d at 377.

89. *Id.* at 363, 722 A.2d at 380.

of duty by an employee to extinguish the obligation of the employer to pay future compensation under a contract of employment, the breach, even if willful, must be material."[90]

The court further clarified this rule by distinguishing a case cited by the Bank on appeal. The Bank had cited *Peurifoy v. Congressional Motors, Inc.*,[91] to suggest that their obligation to pay wages to Sachs was conditioned on his ability to perform his duties under the contract.[92] The court explained that *Peurifoy* applied the principle of "constructive condition of substantial performance."[93] The court explained that this principle does not terminate the employer's promised performance without taking into consideration the substantiality of the employee's performance.[94] The court, quoting *Foster-Porter Enterprises, Inc. v. De Mare*,[95] stated that "[u]nless a contract provision for termination for breach is in terms exclusive, it is a cumulative remedy and does not bar the ordinary remedy of termination for 'a breach which is material, or which goes to the root . . . of the contract.'"[96]

The court then analyzed whether Sachs's conduct amounted to a material breach of his consultant contract. The court first noted that the only reason given by the Bank for terminating Sachs's consulting contract was the overdrafts.[97] The court then discussed the various elements that it considered determinative of whether Sachs's overdrafts amounted to a material breach of the contract.[98] First, the court stated that the record showed a factual dispute over whether the Bank knew of the overdrafts prior to the approval of the consulting

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90. *Id.* (citing St. Paul at Chase Corp. v. Mfrs. Life Ins. Co., 262 Md. 192, 217-18, 278 A.2d 12, 25 (1971); Md. Credit Fin. Corp. v. Hagerty, 216 Md. 83, 92, 139 A.2d 230, 234 (1958)).

91. 254 Md. 501, 255 A.2d 332 (1969). In *Peurifoy*, an employee, due to mental health problems, was unable to perform as general manager of an automobile dealership under the employment contract. *Id.* at 502-03, 255 A.2d at 333. The Court of Appeals held for the defendant, ruling that the plaintiff breached "the constructive concurrent condition that [he] would render service as comptroller and general manager in a reasonably satisfactory manner and in accordance with generally accepted standards for that employment." *Id.* at 515, 255 A.2d at 339.

92. *Regal Sav. Bank*, 352 Md. at 363-64, 722 A.2d at 380-81.

93. *Id.* at 364, 722 A.2d at 380-81; *see also* 3A A. CORBIN, CORBIN ON CONTRACTS § 679 (1960) ("The employer's duty to pay wages is almost always constructively conditional on the rendition of substantial performance of his promised service by the employee.").

94. *Regal Sav. Bank*, 352 Md. at 364, 722 A.2d at 381.

95. 198 Md. 20, 81 A.2d 325 (1951).

96. *Regal Sav. Bank*, 352 Md. at 364, 722 A.2d at 381 (internal quotation marks omitted) (quoting *De Mare*, 198 Md. at 36, 81 A.2d at 333).

97. *Id.*

98. *Id.* at 364-72, 722 A.2d at 381-85.

contract.[99] The court noted that whether the Bank knew of Sachs's overdrafts bore "on the materiality of Sachs's overdrafts."[100]

Next, the court stated that federal regulations also affected the materiality of Sachs's overdrafts.[101] The court explained that the applicable federal regulations could lead to a number of conflicting inferences.[102] First, the federal regulations state that banks cannot cover for overdrafts by executive officers or directors;[103] yet these regulations also state that a bank may pay an overdraft from another account at the bank if there has been a preauthorized transfer of funds.[104] Second, the court explained that although the Bank allegedly suffered a tremendous economic loss, the accounts analyzed by the Bank's auditors might have exceeded the scope of federal prohibition.[105] According to the court, "[w]hat the jury may consider to be a disproportion between the loss alleged by the Bank and the loss to Sachs is a factor to be considered on materiality."[106] Third, the court stated that Sachs's attempts to cover for the overdrafts and the minimal amount of the overdrafts may bear on the inferences a jury could draw regarding the federal regulations.[107] Fourth, the court reasoned that the Bank's own internal policy regarding employee overdrafts was

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99. *Id.* at 364, 722 A.2d at 381. Sachs testified that Holzman, Sachs's immediate inferior, knew of the overdrafts. *Id.* at 364-65, 722 A.2d at 381. This was distinctly possible, according to the court, because Holzman had a tendency of complaining about Sachs's irregular conduct. *Id.* at 365, 722 A.2d at 381. The court also pointed to Sachs's testimony that he and a number of the Bank's board members were involved in businesses together. *Id.* These accounts were also at the Bank, and no overdraft charges were ever assessed against them. *Id.*

100. *Id.* at 365, 722 A.2d at 381.

101. *Id.*

102. *Id.* at 365-68, 722 A.2d at 381-82.

103. *Id.* at 365, 722 A.2d at 381 (citing the Federal Reserve Act, 12 U.S.C. § 375b(6)(A) (1993)).

104. *Id.* at 365-66, 722 A.2d at 381-82 (citing 18 U.S.C. § 375b(6)(B) (1993); Regulation O, 12 C.F.R. § 215.4(c) (1993)).

105. *Id.* at 366-67, 722 A.2d at 382. The loss alleged by the Bank's auditors may not have been analyzed properly according to the court. *See id.* at 366, 722 A.2d at 382. The federal regulations prohibit only overdrafts on accounts held by executive officers. *Id.* (citing 12 C.F.R. § 215.4(e)). However, the Bank's auditors counted all accounts owned by Sachs, his former wife, his cousin, his secretary, and other companies run by Sachs which may or may not have qualified. *Id.* at 366-67, 722 A.2d at 382.

106. *Id.* at 367, 722 A.2d at 382.

107. *Id.* at 368, 722 A.2d at 382-83. Sachs attempted to cover for his overdrafts by preauthorizing the transfer of funds from his other accounts to cover any overdrafts. *Id.*, 722 A.2d at 382. Further, in only five of the thirty individual account-months analyzed by the auditors were Sachs's overdrafts over $1000. *Id.*, 722 A.2d at 382-83. Federal regulations only prohibit overdrafts exceeding $1000. *Id.*, 722 A.2d at 383 (citing Regulation O, 12 C.F.R. § 215.4(e)). Finally, the federal regulators never complained to the Bank about Sachs's overdrafts. *Id.*

meant to mirror the federal regulations.[108] Because so many conflicting inferences could be drawn about the materiality of Sachs's overdrafts in light of the federal regulations, the court reasoned that the internal regulations could not be conclusive either.[109]

The court next analyzed Sachs's proposition that the Bank had not demonstrated, as a matter of law, that the overdrafts were material to Sachs's consultant contract.[110] The court explained that the Bank was required to "demonstrate the materiality of the overdrafts to the new position," in order to show that the "earlier overdrafts constituted just cause later to terminate the consulting contract."[111] The Bank argued, based on Sachs's deposition testimony,[112] that Sachs had still viewed himself as having the authority to tell the employees at the Bank that they had to honor his checks, even if his accounts lacked the sufficient funds to cover the checks.[113] The court reasoned that although the Bank's argument was one interpretation of Sachs's deposition testimony, a jury could arrive at a very different interpretation.[114] According to the court, a jury could take the same statements and conclude only that Sachs's responsibilities as a consultant were not going to be substantially different than those he held as president.[115] The court stated that this alternate interpretation was supported by physical evidence, including Sachs's moving out of the Bank's building and the hiring of a new president.[116] The court concluded by reasoning that, because of the conflicting inferences that a jury could draw from the above facts, it was improper to grant the defendant's motion for summary judgment.[117]

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108. *Id.* at 369, 722 A.2d at 383. The policy that Sachs allegedly violated was given in the Bank's April 27, 1992 Plan for Avoidance of Conflicts of Interests. *Id.* at 368-69, 722 A.2d at 383. The policy reads: "'The Bank is prohibited from paying an overdraft on an account of any of its affiliated persons.'" *Id.* at 369, 722 A.2d at 383. The policy also states that a Bank officer who violates the policy "'(i) may be required to return to the bank any benefits received and (ii) may be subject to dismissal.'" *Id.* The Court of Appeals found that this regulation was an attempt to mirror Regulation O. *Id.*

109. *Id.* at 369, 722 A.2d at 383.

110. *Id.* at 369-72, 722 A.2d at 383-85.

111. *Id.* at 369, 722 A.2d at 383.

112. *See id.* at 369 n.5, 722 A.2d at 383 n.5.

113. *Id.* at 369, 722 A.2d at 383. The Bank asserted at oral argument that Sachs "'very much viewed himself [as having] the ability to tell those little people that work down in the Bank to honor a check.'" *Id.* The Bank supported this proposition by referring to an extensive quotation from Sachs's deposition. *Id.*; *see id.* at 369 n.5, 722 A.2d at 383 n.5.

114. *Id.* at 370, 722 A.2d at 384.

115. *Id.*

116. *Id.* at 371-72, 722 A.2d at 384.

117. *Id.* at 372-73, 722 A.2d at 384-85.

4. Analysis.—In *Regal Savings Bank v. Sachs*, the Court of Appeals held that summary judgment was inappropriate because an issue of fact existed as to whether Sachs materially breached his consultant contract with the Bank through actions he took as the Bank's president and CEO.[118] This holding suggests that Sachs could have materially breached his employment contract before the contract was even formed. Applying the doctrine of material breach to events that occur before a contract is formed is doctrinally erroneous and does not reflect the factual realities of the case. What really happened in this case was a mistake on the part of the Bank *at contract formation.* The court could have decided this dispute most accurately by simply asking which of the two parties was in the position to avoid the mistake at the least cost when the contract was formed. Not only is this kind of analysis more applicable to the facts of the case, but it is also a method of analysis that the Court of Appeals should use in deciding future contract disputes. This method of analysis is advantageous because it efficiently assigns liability and actually encourages the disclosure of information prior to contract formation.

a. Why the Doctrine of Material Breach Does Not Apply.—The Court of Appeals made a fundamental doctrinal error by applying the doctrine of material breach to the facts of this case. As stated above, in Maryland a material breach can only occur when there is a failure to perform when performance is due.[119] Parties do not contract for past performance; performance cannot be due before the formation of a contract. Because performance cannot be due before a contract is formed, a contract cannot be breached by actions taken before the formation of the contract. Yet, the court held that this could have happened in Sachs's case.[120]

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118. *Id.*

119. *See supra* notes 76-78 and accompanying text (summarizing the requirements for a material breach in Maryland). This is a well-established doctrine in contract law. *See* FARNSWORTH, *supra* note 37, § 8.8, at 601 (explaining that "[w]hen performance is due . . . any failure to render it is a breach"); RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 235(2) ("When performance of a duty under a contract is due any non-performance is a breach.").

120. *See Regal Sav. Bank*, 352 Md. at 372-73, 722 A.2d at 385 (stating that Sachs could be found to have breached his employment contract if a jury determined his overdrafts were material). Additionally, the court could not have found that Sachs's overdrafts were an anticipatory repudiation of the consulting contract. *See* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 253(2) ("Where performances are to be exchanged . . . one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance."). An anticipatory repudiation occurs when one party manifests to the other that they will not perform at least some part of their obligations under the contract. *See id.* § 251; FARNSWORTH, *supra* note 37, § 8.21, at 662 Sachs could not have antici-

According to the court, a jury could find that Sachs breached his contract by overdrafting his personal accounts while serving as the Bank's president.[121] He served as the Bank's president *before* he contracted with the Bank to be a consultant.[122] The effective starting date of the consulting contract was April 1, 1993.[123] The overdrafts complained of by the Bank's auditors occurred from January 1992 to March 1993.[124] The overdrafts were made known to the Bank's board of directors on March 29, 1993.[125] Because the overdrafts occurred from January 1992 to March 1993, and Sachs's employment as a consultant did not begin until April 1, 1993, the acts that allegedly constituted a material breach occurred before the contract began. As shown above, acts that occurred before the formation of a contract cannot be a breach of that contract. Therefore, the doctrine of material breach should not have been applied to the facts of this case.

b. A Case of Mistake.—What really happened in this case was a mistake—"a belief," existing at the time of contract formation, "that is not in accord with the facts."[126] Representatives of the Bank made a mistake when they contracted with Sachs. They believed they were hiring a man who had helped make the Bank successful and who had avoided making serious overdrafts on his personal accounts[127]—obviously a belief that was not in accord with the facts.[128] Sachs actually had made a number of overdrafts on his personal accounts.[129] As a result, this case should be analyzed as a case of mistake.[130]

To properly decide this case of mistake, the Court of Appeals should have simply determined which party was able to avoid the mis-

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patorily repudiated his consulting contract. For anticipatory repudiation to occur there necessarily has to be a contract to repudiate. Because Sachs's overdrafts occurred before he contracted to be a consultant with the Bank, there was no contract to repudiate.

121. *Regal Sav. Bank*, 352 Md. at 372-73, 722 A.2d at 385.

122. *See id.* at 357, 722 A.2d at 377 (explaining that Sachs "serv[ed] as the bank's president under an at-will contract that immediately preceded the consulting contract").

123. *Id.* at 360, 722 A.2d at 379.

124. *Id.* at 361, 722 A.2d at 379.

125. *Id.*

126. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 151.

127. *See Regal Sav. Bank*, 352 Md. at 361, 722 A.2d at 379. This is, of course, assuming that the Bank did not know of the overdrafts before they contracted with Sachs to be a consultant. The remainder of this Note will proceed under the assumption that the Bank was not lying when it claimed not to have known of the overdrafts.

128. *Id.* at 361, 722 A.2d at 379.

129. *Id.*

130. More specifically, this case should be analyzed as a case of unilateral mistake. "A unilateral mistake occurs when only one party has an erroneous belief as to the facts." FARNSWORTH, *supra* note 37, § 9.4, at 693. Here, only the Bank had an erroneous belief as to the facts.

take at contract formation at the least cost.[131] Deciding the case in this way is beneficial for three reasons. First, such a decision takes into consideration the important role that economics plays in contract law.[132] Second, analyzing the case in this way properly allocates the risk of mistake to the party able to avoid the mistake at the least cost.[133] Third, properly allocating the risk of mistake has the added

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131. Under Maryland law, a case of unilateral mistake would normally be decided under the doctrine announced in *City of Baltimore v. DeLuca-Davis Construction Co.*, 210 Md. 518, 124 A.2d 557 (1956). In *DeLuca*, the Court of Appeals announced that a contract can be avoided for unilateral mistake only under these circumstances:

> 1, the mistake must be of such grave consequences that to enforce the contract as made or offered would be unconscionable; 2, the mistake must relate to a material feature of the contract; 3, the mistake must not have come about because of the violation of a positive legal duty or from culpable negligence; 4, the other party must be put in statu quo [sic] to the extent that he suffers no serious prejudice except the loss of his bargain.

Id. at 527, 124 A.2d at 562. This doctrine follows the prevailing view that makes rescinding a contract because of unilateral mistake fairly difficult. *See* FARNSWORTH, *supra* note 37, § 9.4, at 694 (explaining that while many courts have abandoned the rule disallowing parties to avoid contracts due to unilateral mistake, most have only "recognized a limited right of avoidance"); *see also* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS ch. 6, introductory note, at 380 (explaining that a contract can be avoided for unilateral mistake "only in extreme cases where it would be unconscionable to require [a party] to perform, or where the other party had reason to know of the mistake or his fault caused it").

Even though this doctrine is well established in Maryland and other jurisdictions, it should not have been applied in the present case. Analyzing this case under the black-letter doctrine of unilateral mistake fails to take into account whether one of the parties to the contract could have borne the risk of loss at a lower cost. Both the *Restatement (Second) of the Law of Contracts* and recent commentaries acknowledge the importance of risk allocation in cases of mistake. *See* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 154 (suggesting a manner in which courts should determine when a party bears the risk of mistake); *see also* FARNSWORTH, *supra* note 37, §§ 9.3 & 9.4, at 683-700 (explaining that relief is neither available under unilateral nor mutual mistake if one of the parties to the contract bears the risk of mistake); Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 3 n.2 (1978) ("Recent treatments of mistake, however, particularly emphasize the importance of determining which party to the contract bears the risk of the mistake in question.").

Moreover, it is undesirable to follow blindly a legal rule that ignores social and economic realities. *See* RICHARD POSNER, OVERCOMING LAW 4 (1995) (advocating a pragmatic approach to law—"an approach that is practical and instrumental rather than essentialist—interested in what works and what is useful rather than in what 'really' is"). As Justice Holmes eloquently stated:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1921).

132. *See infra* notes 135-156 and accompanying text (discussing the importance of economic analysis in contract law).

133. *See infra* notes 157-165 and accompanying text (asserting that the economically efficient allocation of risk in this case places the risk of mistake on the employee).

benefit of actually encouraging the disclosure of information in contract negotiations.[134]

(1) The Importance of Economic Analysis in the Law of Contracts.—The law of contracts governs activities that are "quintessentially economic."[135] A fundamental economic principle is that, if voluntary exchanges are permitted, resources (goods and services) "will gravitate toward their most valuable uses," making society better off as a result.[136] Contracts are often the means by which these exchanges are enacted.[137] Thus, contracts facilitate a socially desirable process by which goods and services ultimately end up in the hands of the people who value them most.[138] Moreover, because this is a socially desirable process, it would be wasteful for these exchanges not to take place.[139]

One way the rules of contract law can encourage the exchange process is to make it less costly for the parties by supplying default terms.[140] Default terms make contracts easier to execute by reducing the transaction costs associated with the bargaining process.[141] Such costs may include "the cost in time and money of sorting out all possible contingencies and then drafting relevant contract provisions."[142] Default terms help ease these transaction costs by providing rules on which the parties can rely in the event that an unbargained for contin-

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134. *See infra* notes 166-174 and accompanying text (discussing the ways in which penalty defaults encourage the disclosure of information).

135. ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW 1 (1979).

136. *Id.* at 1-2.

137. *See* MARVIN CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 1-2 (1998).

138. *See id.* at 2 ("The trading process is not a poker game in which one player wins what another loses; rather, it is a kind of joint undertaking which increases the wealth of both parties and from which both emerge with a measure of enhanced utility.").

139. *Id.* ("The act of making an exchange will (in the generality of cases) lead not only to individual but to mutual advantage despite a thoroughly self-centered outlook on the part of the traders. That being so, it would be unfortunate, even wasteful in economic terms, if the exchange did not take place.").

140. *See id.* at 9 (noting that standing rules allow parties to avoid bargaining over every possible contingency in a contract); KRONMAN & POSNER, *supra* note 135, at 4 (stating that contract law provides "a standard set of risk-allocation terms for use by contracting parties"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 92 (4th ed. 1992) (asserting that a function of contract law is "filling out the parties' agreement by interpolating missing clauses").

141. KRONMAN & POSNER, *supra* note 135, at 4 (stating that default terms alleviate the need for parties "to incur the expense of writing their own risk-allocation rule into the contract").

142. CHIRELSTEIN, *supra* note 137, at 9.

gency arises.[143] As one writer has stated, "the parties can go forward on the assumption that they have a complete contract *without* the need to reach express agreement on each and every question that might have bearing on their relationship, because the legal rules serve to fill in the gaps."[144]

To accomplish this reduction in transaction costs, the terms supplied by the law must be terms that most parties would have negotiated if they had had the time to do so.[145] Economic principles can be applied to formulate this hypothetical bargain.[146] An economist would reason that the parties would probably agree to terms that benefit both parties.[147] In other words, courts and legislatures should assume that parties will "seek to maximize their *combined* benefits [net of their joint costs] under the contract *by allocating risks and responsibilities in the least costly manner.*"[148] Terms that allocate risks and responsibili-

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143. *See id.* at 9 (commenting that "the presence of standing rules on which the parties can rely in the absence of a fully articulated agreement makes it unnecessary to burden every contractual undertaking with the costly process" of attempting to draft a "wholly comprehensive" contract); *see also* WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 130 (2d ed. 1988) (noting that "contract law can help reduce transaction costs by providing transactors with information on normal exchange conditions and on rules that apply, should conflicts arise"); POSNER, *supra* note 140, at 92-93. Judge Posner writes:

> [S]ome contingencies, even though foreseeable in the strong sense that both parties are fully aware that they may occur, are so unlikely to occur that the costs of careful drafting to deal with them might exceed the benefits, when those benefits are discounted by the (low) probability that the contingency will actually occur. It may be cheaper for the court to "draft" the contractual term necessary to deal with the contingency if and when it occurs.

POSNER, *supra* note 140, at 92, 93.

144. CHIRELSTEIN, *supra* note 137, at 9-10.

145. *Id.* at 10; POSNER, *supra* note 140, at 93.

146. *See* POSNER, *supra* note 140, at 93 (commenting that "[o]ften there will be clues in the language of the contract [as to what the parties would have bargained for]. But often there will not be, and then the court may have to engage in economic thinking . . . .").

147. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 27 (2d ed. 1989). Professor Polinsky explained:

> Contract law can be viewed as filling in these "gaps" in the contract—attempting to reproduce what the parties would have agreed to if they could have costlessly planned for the event initially. Since the parties would have included contract terms that maximize their joint benefits net of their joint costs—both parties can thereby be made better off—this approach is equivalent to designing contract law according to the efficiency criterion.

Id.

148. CHIRELSTEIN, *supra* note 137, at 10 (second emphasis added); *see also* POSNER, *supra* note 140, at 93 (noting that the parties "have a mutual interest in minimizing the cost of performance, and the court can use this interest to fill out a contract along lines that the parties would have approved at the time of making the contract").

ties in this way—and therefore help resources gravitate toward their most valuable use—are deemed efficient.[149]

The reason that courts should use efficient default terms in contracts is that the parties will likely negotiate around inefficient rules of contract law.[150] If the terms supplied by the law force parties constantly to negotiate around them, the parties will incur greater costs.[151] When greater costs are imposed, the contracting process is discouraged.[152] Thus, courts should create default terms to reflect what the parties would have bargained for, had they been able to afford to spend the time negotiating the terms.[153]

Simply put, according to an economic analysis, contract law should supply default terms that are efficient (those which allocate risks and responsibilities in the least costly way), because those are the terms the parties would have desired if they had directly negotiated the contingency.[154] Establishing terms that the parties would desire reduces transaction costs because it saves the parties the time and resources required to negotiate over every possible contingency that could arise.[155] Reducing transaction costs leads to a less-costly exchange process. A less-costly exchange process makes society better off because resources are allowed to move more easily to those individuals who value them most.[156]

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149. *See* POSNER, *supra* note 140, at 13.

150. KRONMAN & POSNER, *supra* note 135, at 6. This is an application of the famous Coase Theorem. *Id.* at 6 n.6. The Coase Theorem is derived from an influential article published by Ronald Coase. Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). For Coase, transaction costs, in general, include finding people with whom to bargain, informing those people that "one wishes to deal and on what terms," negotiating the bargain, writing the contract, and enforcing the contract. *Id.* at 15. Coase contended that, absent these transaction costs, the efficient outcome (one where the aggregate benefits of a situation are increased in relation to the aggregate costs of the situation) will occur regardless of the choice of legal rules. *Id.* at 15. As Coase stated "[i]t is always possible to modify by transactions on the market the initial delimitation of rights . . . . [I]f such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production." *Id.*

151. CHIRELSTEIN, *supra* note 137, at 10.

152. *See id.* at 9 (stating that large transaction costs "would be prohibitive even for large transactions, and . . . [f]or the smaller, routine transactions of daily business or personal life, anything more complex and time-consuming than a one- or two-page purchase order is obviously impractical").

153. POSNER, *supra* note 140, at 93.

154. *See* KRONMAN & POSNER, *supra* note 135, at 6 ("The parties will prefer efficient terms because those are the terms that minimize the costs of the transaction to them . . . .").

155. CHIRELSTEIN, *supra* note 137, at 9.

156. *See* KRONMAN & POSNER, *supra* note 135, at 2 ("The existence of a market—a locus of opportunities for mutual advantageous exchanges—facilitates the allocation of the good or service in question to the use in which it is most valuable, thereby maximizing the wealth of society.").

(2) The Economically Efficient Answer to Sachs's Case.—The risk of an employer making a mistake about the people it hires is a cost to both employees and employers.[157] Having access to relevant information is the best way to reduce this cost.[158] Although information can be costly to produce, either the employer or the employee may be able to obtain the information more cheaply.[159] As stated above, an economically efficient rule allocates risks and responsibilities in the least costly manner.[160] Therefore, in the case of a mistake, the economically efficient answer is to allocate the risk of that mistake to the party who is the cheaper information gatherer (or "least-cost avoider" of the mistake) at the time that the contract is formed. [161] In Sachs's case, and others that are factually similar, the employee is the party in the position to avoid the mistake at the least cost and thus should be allocated the risk of the type of mistake that was made by the Bank.[162]

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157. *See* Kronman, *supra* note 131, at 2-3. Professor Kronman explains that the risk of a mistake is a cost to the contracting parties because the "occurrence of a mistake . . . increases the resources which must be devoted to the process of allocating goods to their highest-valuing users." *Id.* at 3. Properly assigning the risk minimizes these costs. *Id.* at 4-5.

158. *See id.* at 4. There is also one more way that parties to a contract can reduce the cost of a possible mistake. One or both of the parties could insure against the risk of a mistake by purchasing insurance from a professional insurer or by self-insuring. *Id.* at 3-4.

159. *See id.* at 4.

160. *See supra* notes 145-156 and accompanying text (describing economically efficient contract terms).

161. *See* Kronman, *supra* note 131, at 4-5. Professor Kronman states:

> If the parties to a contract are acting rationally, they will minimize the joint costs of a potential mistake by assigning the risk of its occurrence to the party who is the better (cheaper) information-gatherer. Where the parties have actually assigned the risk—whether explicitly, or implicitly through their adherence to trade custom and past patterns of dealing—their own allocation must be respected. Where they have not—and there is a resulting gap in the contract—a court concerned with economic efficiency should impose the risk on the better information-gatherer. This is so for familiar reasons: by allocating the risk in this way, an efficiency-minded court reduces the transaction costs of the contracting process itself.

Id. (footnotes omitted).

162. There is Maryland precedent that supports allocating the risk of a mistaken hiring to the employee. *See* Wischhusen v. Am. Medicinal Spirits Co., 163 Md. 565, 163 A. 685 (1933). In *Wischhusen*, the defendant, a corporation engaged in the business of distilling whiskey, employed the plaintiff, an expert in the manufacture of whiskey. *Id.* at 567, 163 A. at 685. Less than one month later, the defendant fired the plaintiff when its application with the federal government for permission to distill whiskey was denied because the government considered the plaintiff to be untrustworthy. *Id.* at 567-68, 163 A. at 685-86. The government refused to issue the required permit to the defendant unless the defendant fired the plaintiff. *Id.* at 568, 163 A. at 686. The Court of Appeals found that the plaintiff had breached his contract and could not recover against the defendant. *Id.* at 571, 573, 163 A. at 687, 688. The court stated that the plaintiff breached his contract because he

Employees who have done things in the past that make them a possible liability to their employers are clearly the better (cheaper) information gatherers. They know whether they have engaged in conduct that either may adversely affect their ability to perform their job or impose an unnecessary cost on their employers. Their employers probably do not know what potential employees have done in the past, and it would most likely require a tremendous expenditure of resources to discover such information.

Sachs's case serves as a perfect example of a situation where the employee is a cheaper gatherer of information. Sachs knew that he had committed the overdrafts while he was negotiating with the Bank over his consulting contract.[163] It obviously cost him nothing to acquire that information. On the other hand, the Bank did not find out about the overdrafts until its auditors conducted a time-consuming and costly search of the Bank's account records.[164] Because Sachs was the least-cost avoider of this mistake, the efficient answer to this case should have been to make Sachs bear the risk of that mistake. Placing the burden of the possibility of a mistake on Sachs would have allowed the Bank to rescind Sachs's consultant contract without being liable for breach.[165]

(3) The Added Benefit of Encouraging the Production of Information and Reducing the Occurrence of Mistakes.—Allocating the risk of loss to the employee in a situation like Sachs's has an added benefit—it

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failed to fulfill his implicit representation to his employer that he was fit to perform the job for which he was hired. *Id.* at 571, 163 A. at 687.

In his treatise on Maryland employment law, Stanley Mazaroff suggests that *Wischhusen* and its predecessor, *Baltimore Baseball Club & Exhibition Co. v. Pickett*, 78 Md. 375, 28 A. 279 (1894), stand for the proposition that employers have the ability to fire employees if they are incompetent to perform the duties for which they were hired. STANLEY MAZAROFF, MARYLAND EMPLOYMENT LAW § 3.3(A)(2), at 193-96 (1990). According to Mazaroff, through their incompetence, such employees breach an implied duty of their employment contract. *Id.* at 193-94. Unfortunately, the analysis in *Wischhusen* is essentially the same breach analysis that the Court of Appeals used in Sachs's case. *Compare Wischhusen*, 163 Md. at 571-72, 163 A. at 687 (explaining that Wischhusen breached his employment contract by actions taken before the contract was formed), *with Regal Sav. Bank*, 352 Md. at 372-73, 722 A.2d at 385 (explaining that actions Sachs took prior to his consulting contract may be found to be a material breach of that contract). As discussed above, such an analysis is doctrinally inaccurate and ignores the factual realities of the case.

163. *See Regal Sav. Bank*, 352 Md. at 361, 722 A.2d at 379 (stating that Sachs did not dispute the finding of substantial overdrafts by the Bank's auditors).

164. *See id.* (discussing the audit process that uncovered the overdrafts).

165. *See* RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS ch. 6, introductory note ("In general, the appropriate relief for mistake takes the form of avoidance of the contract.").

encourages the disclosure of information.[166] It does this by acting as a penalty default term to employees.[167] Penalty default terms encourage the disclosure of information by providing a strong incentive to at least one of the parties to negotiate around the default term.[168] This process of negotiation leads to the disclosure of information.[169]

Sachs's case is an excellent example of this principle. When the parties sat down at the bargaining table, Sachs knew that he had committed overdrafts on personal accounts at the Bank, while the Bank did not.[170] For obvious strategic reasons, Sachs did not want to disclose this fact.[171] However, if Sachs knew that he would be fired if the Bank subsequently learned of the overdrafts, he may have disclosed that information. That disclosure would have occurred if Sachs had attempted to negotiate terms in the contract which would prevent the Bank from firing him for the overdrafts.

There are two practical benefits of disclosure in Sachs's case. First, the Bank may have appreciated Sachs's honesty and still have offered him the consulting job. After all, Sachs was obviously a valuable employee.[172] The Bank might have been willing to forget about the overdrafts or simply might have required Sachs to repay them.[173] In this scenario, both parties would have avoided the risk of a mistaken belief about the overdrafts. Second, even if the Bank would not have hired Sachs, this failure to contract would have been beneficial because the parties would have been able to avoid the costs of the

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166. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91, 97 (1989). This may also be another reason why allocating the risk of mistake to the employee is economically efficient, because encouraging the production of information leads to greater efficiency. *Id.* at 97.

167. Professors Ayres and Gertner introduce this idea of penalty defaults and suggest that the defaults "are purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties." *Id.* at 91. Allocating the risk of a mistake to the employee is a penalty default term to the employee because it allows employers to rescind the employment contract. In essence, allowing employers to rescind an employment contract is functionally identical to allowing the employer to fire the employee.

168. *Id.* at 97.

169. *See id.* ("The very process of 'contracting around' can reveal information to parties inside or outside the contract.").

170. *See Regal Sav. Bank*, 352 Md. at 361, 722 A.2d at 379 (stating that the Board agreed to retain Sachs on March 8, 1993, and that the overdrafts occurred from January 1992 to March 1993).

171. Sachs may have believed that the Bank would not hire him as a consultant if he told its representatives about the overdrafts. After all, the Bank subsequently tried to fire him when it learned of his conduct. *See id.* at 361-62, 722 A.2d at 379.

172. *See id.* at 358, 722 A.2d at 378.

173. *See id.* at 261, 722 A.2d at 379 (stating that the auditors calculated that the overdraft charges amounted to $19,975, and interest totaled $4298.81).

mistake. The Bank would have saved the costs and delays of having to fire Sachs; Sachs would have saved the costs and delays associated with being fired; both parties would have saved the costs of the subsequent litigation.

5. Conclusion.—Allocating the risk of a mistake like that made in Sachs's case reduces the transaction costs associated with the employment process by allocating the risk of mistake to the least-cost avoider. Because such a rule works to reduce transaction costs, it is economically efficient.[174] Moreover, allocating risks and responsibilities in this way has the added benefit of giving employees like Sachs an incentive to disclose information. Encouraging the disclosure of information may allow the parties to avoid mistakes in the first place.

In *Regal Savings Bank v. Sachs*, the Court of Appeals of Maryland improperly applied the doctrine of material breach. The court should have analyzed the present case as a case of mistake and then determined which of the two parties was the least-cost avoider. Applying such a rule would have allowed the court to develop a default rule of contract law that, by reducing transaction costs, actually helps parties form contracts and make deals. Making the contracting process easier is socially desirable because contracts facilitate a process by which individuals acquire goods and services that they find valuable. The contracting process has been described as "the commerce of information for ultimate gain."[175] The Maryland courts should take advantage of opportunities to remove the legal rules that impede this "commerce." In this case, they missed their chance.

STRIDER L. DICKSON

174. *See* Kronman, *supra* note 131, at 4-5 (stating that an "efficiency-minded" court will attempt to reduce transaction costs).

175. RONALD M. SHAPIRO & MARK A. JANKOWSKI, THE POWER OF NICE 17 (1998).

V. CRIMINAL LAW

A. *The Starting Point of Maryland's Gradual Transition Back to the Proximate Cause Theory for Determining Criminal Liability Under the Felony-Murder Doctrine*

In *Watkins v. State*,[1] the Court of Appeals of Maryland affirmed a defendant's first-degree felony murder conviction.[2] The court held that Watkins, as an accomplice, was criminally liable for a homicide that was committed by a co-felon within the common design of a robbery.[3] The court found that the killing of a witness, whether a co-felon or other witness, was necessarily within the common design of a robbery because such killings are "implicitly foreseeable."[4] By creating this standard, the court expands the agency theory of accomplice liability under the felony-murder doctrine to include those events that are implicitly foreseeable within the common design of a felony. The court, however, did not define the boundaries of its "implicitly foreseeable" standard. As a result, *Watkins* may mark the beginning of Maryland's transition back to the proximate cause theory of accomplice liability.

1. The Case.—On January 5, 1997, the bodies of John Whittington and Derrick Hilliard were found in a motel room in Camp Springs, Maryland.[5] Both men had been shot in the head at close range and were found naked and face down.[6] Property belonging to Whittington was missing, including his gold rings, a watch, and his white Cadillac.[7] Three weeks later, police officers found Whittington's car eight blocks from the home of the defendant, Mark Davon Watkins.[8] The defendant's fingerprints were found on Whittington's car and eventually led to the arrest of Watkins and Eric Jenkins.[9]

Upon his arrest, Watkins made several inconsistent and incriminating statements to police detectives.[10] His statements regarding Hil-

1. 357 Md. 258, 744 A.2d 1 (2000).
2. *Id.* at 273, 744 A.2d at 9.
3. *Id.*
4. *Id.*
5. *Id.* at 260, 744 A.2d at 2.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* Jenkins and Watkins were observed helping Hilliard put his property into Whittington's car around 8 p.m. on the evening of the murder. *Id.* at 261, 744 A.2d at 2. That was the last public sighting of any of the four men prior to the murders. *Id.*
10. *Id.* at 261, 744 A.2d at 2. Most of the discrepancies in Watkins's statements dealt with the degree of his participation in the events that took place on the night of the shootings, as well as the role that Hilliard played in the events of the evening. *See id.* at 263, 744

liard's role in the robbery conflicted as to whether Hilliard was a fellow accomplice or a robbery victim.[11] The evidence at trial indicated that regardless of Hilliard's initial role in the robbery, Jenkins killed him to eliminate any witnesses to the crime.[12]

During trial, Watkins made a motion for judgment of acquittal, contending that because Hilliard was an accomplice in Whittington's robbery, it was not foreseeable that Jenkins would kill Hilliard.[13] Accordingly, Watkins argued that he could not be an accomplice to that murder.[14] The trial court denied Watkins's motion, finding that a jury should decide whether Hilliard was an accomplice.[15] Watkins then requested that the court give a "Mumford-type instruction" to the jury, which asks the jury to consider whether the death of the victim was within the common design of the felony and in the furtherance of the felony or escape therefrom.[16] Although Watkins did not present such an instruction to the court, it appears that it would have been similar to the kind of instruction that the Court of Special Appeals held should have been given in *Mumford v. State*—"that, if the jury were to find that Watkins could not have anticipated that Jenkins would kill Hilliard, it must acquit him of Hilliard's murder."[17] How-

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A.2d at 3-4. In his first written and oral statements, Watkins stated that both Whittington and Hilliard were the intended robbery victims of Jenkins. *Id.* at 261, 744 A.2d at 2-3. In that statement, Watkins asserted that Jenkins alone had planned the robbery and that Jenkins had killed both men to get rid of any witnesses to the crime. *Id.* In his second written statement, Watkins no longer stated that Hilliard was an intended robbery victim, but instead painted the picture of Hilliard as Jenkins's accomplice. *Id.* at 262, 744 A.2d at 3. During this second statement, Watkins also admitted that he had gone to a nearby 7-Eleven to serve as a lookout for the robbery and to provide the means of escape for Jenkins. *Id.* Finally, during his third written statement, Watkins again admitted to helping plan the robbery and serving as a lookout. *Id.* at 263, 744 A.2d at 3. However, Watkins admitted that he was not serving as a lookout at the time of the shooting, but instead was standing directly outside the motel room. *Id.* Watkins claimed that he could hear everything that occurred inside the motel room. *Id.* He stated that after Jenkins told Whittington to "'give [him] the money,'" a struggle ensued between Jenkins and Whittington, and Jenkins "'started shooting.'" *Id.* Watkins stated that Jenkins then came out of the motel room with the gun, got into Whittington's car, and drove away. *Id.* Watkins claimed that he then entered the motel room where he saw the victims, Hilliard and Whittington. *Id.*

11. *Id.* at 263, 744 A.2d at 4.

12. *Id.* at 263-64, 744 A.2d at 4.

13. *Id.* at 264, 744 A.2d at 4.

14. *Id.*

15. *Id.*

16. *Id.*; *see* Mumford v. State, 19 Md. App. 640, 644, 313 A.2d 563, 566 (1974). If the jury finds that the action of a co-felon was outside the common design of the felony, then the jury should find that the action was an independent product of the co-felon's mind and find the defendant accomplice not guilty of felony-murder. *Id.*

17. *Watkins*, 357 Md. at 264-65, 744 A.2d at 4; *see Mumford*, 19 Md. App. at 644, 313 A.2d at 566.

ever, the trial court refused to give such an instruction to the jury,[18] and the jury returned a guilty verdict against Watkins on two counts of felony-murder.[19]

Watkins then filed an appeal with the Maryland Court of Special Appeals.[20] The defendant claimed that if the court had given a "Mumford-type instruction" and the jury had believed that Hilliard was an accomplice, it would have found him not guilty.[21] Watkins argued that the killing of a co-felon by another accomplice was unforeseeable and was not within the common design of the robbery.[22] The Court of Special Appeals affirmed Watkins's conviction, holding that the trial judge did not err by refusing to give the instruction, because the jury could not have found that the murder was outside of the common design of the co-felons.[23]

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18. *Watkins*, 357 Md. at 265, 744 A.2d at 4. Instead, the jury instructions regarding accomplice liability were, in part, as follows:

> [W]hen two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense or the escape therefrom for each offense committed. . . .
>
> . . . This responsibility known as accomplice liability takes two forms. One, responsibility for the plan or principal offense and; two, responsibility for other criminal acts incidental to the commission of the criminal offense. . . .
>
> . . . In order to establish complicity for other crimes committed during the course of the criminal episode, the State must prove that the defendant participated in the principal offense as an aider and abettor. And in addition, the State must establish that the charged offense was done in furtherance of the commission of the principal offense or the escape therefrom.

Brief for Respondent at 10-11, *Watkins* (No. 42) (emphasis omitted).

The judge's instructions regarding the charge of felony-murder of Derrick Hilliard were as follows:

> Question five. Is the defendant guilty or not guilty of first degree murder? . . . [T]hat is, did the defendant or an accomplice commit robbery with a deadly or dangerous weapon? . . . And, if so, did the defendant or an accomplice shoot and kill Derrick Hilliard incidental or during the course of the robbery? . . . Your verdict will either be guilty or not guilty using a standard of beyond a reasonable doubt, and your verdict must be unanimous.

Id. at 12 (emphasis omitted).

19. *Watkins*, 357 Md. at 260, 744 A.2d at 2. Watkins also was convicted of two counts of use of a handgun in the commission of a crime of violence, robbery with a deadly weapon, and conspiracy to commit robbery with a deadly weapon. Watkins v. State, 125 Md. App. 555, 558, 726 A.2d 795, 796 (1999).

20. *Watkins*, 125 Md. App. at 558, 726 A.2d at 796 (discussing the claims presented in Watkins's post-conviction appeal).

21. *Id.* at 564-65, 726 A.2d at 799.

22. *Id.* at 564, 726 A.2d at 799.

23. *Id.* at 574, 726 A.2d at 804.

The Court of Appeals then granted certiorari to decide whether a co-felon properly can be convicted of felony-murder when an accomplice murders a third co-felon.[24]

2. Legal Background.—Most states have adopted the English common-law felony-murder doctrine, many with some alterations.[25] The doctrine is still recognized and applied, except where it has been abrogated by statute.[26] Through common law, and many times codified within statutes, states have made accomplices criminally liable for felony-murder.[27] Over the years, Maryland courts have attempted to clarify an accomplice's criminal liability for murder under the felony-murder doctrine contained in Article 27, section 410 of the Annotated Code of Maryland.[28] Originally, Maryland used the proximate cause theory to determine an accomplice's criminal liability under the felony-murder rule.[29] However, following the lead of other states, Mary-

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24. *Watkins*, 357 Md. at 259, 744 A.2d at 1.

25. *See* MD. ANN. CODE art. 27, § 410 (2000); *see also* ALA. CODE § 13A-6-2(3) (Michie 1994); ALASKA STAT. § 11.41.110(3) (Michie 1998); ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West Supp. 1998); ARK. CODE ANN. § 5-10-104(a)(4) (Michie 1997); CAL. PENAL CODE § 189 (West Supp. 1998); COLO. REV. STAT. ANN. § 18-3-102(1)(b) (West 1990 & Supp. 1998); D.C. CODE ANN. § 22-2401 (1981); FLA. STAT. ANN. § 782.04(1)(a)(2) (West 1992 & Supp. 1999); GA. CODE ANN. § 16-5-1(c) (1996); IDAHO CODE § 18-4003(d) (1997); 720 ILL. COMP. STAT. 5/9-1(a)(3) (West 1996); IND. CODE ANN. § 35-42-1-1(2)-(3) (West 1998); IOWA CODE ANN. § 707.2(2) (West 1993); KAN. STAT. ANN. § 21-3401(b) (1995); LA. REV. STAT. ANN. § 14:30.1(2)(a) (West 1997 & Supp. 1999); ME. REV. STAT. ANN. tit. 17-A, § 202(1) (West 1977 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1998); N.J. STAT. ANN. § 2C:11-3(a)(3) (West 1995 & Supp. 1998); N.M. STAT. ANN. § 30-2-1 (Michie 1978 & Supp. 1998); N.Y. PENAL LAW § 125.25(3) (McKinney 1997); N.C. GEN. STAT. § 14-17 (1997); N.D. CENT. CODE § 12.1-16-01(1)(a) (1997); OHIO REV. CODE ANN. § 2903.1(B) (West 1994); OKLA. STAT. ANN. tit. 21, § 701.7B (West 1998); OR. REV. STAT. ANN. § 163.115(1)(b) (West 1990 & Supp. 1998); PA. STAT. ANN. tit. 18, § 2502(b) (West 1998); VA. CODE ANN. § 18.2-31(1)(4)(5) (Michie 1996 & Supp. 1998); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (West 1988 & Supp. 1999); W. VA. CODE § 61-2-1 (1997); WIS. STAT. ANN. § 940.03 (West 1996); WYO. STAT. ANN. § 6-2-101(a) (Michie 1997).

26. Campbell v. State, 293 Md. 438, 442, 444 A.2d 1034, 1037 (1982) (quoting Jackson v. State, 286 Md. 430, 435-36, 408 A.2d 711, 715 (1979)). *See generally* Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.5 (1986) (discussing the roots of the American felony-murder doctrine, as well as the application of the doctrine under the agency and proximate cause theories of criminal liability). At least two states have abrogated the felony-murder rule by statute. *See* HAW. REV. STAT. ANN. § 7078.701 (Michie 1998); KY. REV. STAT. ANN. § 507.020 (Michie 1995).

27. LAFAVE & SCOTT, *supra* note 26, § 7.5, at 625-26.

28. *See, e.g., Campbell*, 293 Md. at 452, 444 A.2d at 1042 (employing the agency theory of liability to hold a defendant not liable for deaths caused by persons attempting to thwart the felony); Mumford v. State, 19 Md. App. 640, 644, 313 A.2d 563, 566 (1974) (employing the proximate cause theory of liability to hold a defendant not liable for crimes committed by co-felons, which are outside the common design of the felony); *see also* MD. ANN. CODE art. 27, § 410 (inserting the statutory subsections pertaining to robbery under this section).

29. *See infra* notes 45-63 and accompanying text.

land courts subsequently rejected the use of the proximate cause theory and adopted an agency theory of accomplice liability.[30]

a. English Common Law Felony-Murder and Adoption by Statute in Maryland.—Initially, the English common-law felony-murder rule held that "one who, in the commission or attempted commission of a felony, caused another's death, was guilty of murder, without regard to the dangerous nature of the felony involved or to the likelihood that death might result from the defendant's manner of committing or attempting the felony."[31] Later, English courts limited the felonies applicable under the rule to only those felonies that were inherently dangerous to life.[32]

Many American states have adopted and codified the felony-murder doctrine.[33] These statutes tend to limit the scope of the felony-murder rule to include only those felonies which are dangerous to life.[34] In Maryland, the felony-murder doctrine was codified in Article 27, section 410 of the Annotated Code as follows:

> All murder which shall be committed in the perpetration of, or attempt to perpetrate, any rape, sodomy, mayhem, robbery, burglary, or in the escape or attempt to escape from . . . any jail or penal institution in any of the counties of this State, shall be murder in the first degree.[35]

Further, Maryland courts have held that the intent of the person or accomplice on trial for felony-murder is irrelevant, and that "the fact that the person was engaged in such perpetration or attempt [is] sufficient to supply the element of malice."[36]

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30. *See infra* notes 71-92 and accompanying text.

31. LAFAVE & SCOTT, *supra* note 26, § 7.5(a), at 622 (footnotes omitted).

32. *Id.* This was done mainly because a growing number of defendants were being punished harshly for very minor offenses that involved no threat to life or limb. *Id.*

33. *See, e.g.*, MD. ANN. CODE art. 27, § 410; ARK. CODE ANN. § 5-10-104(a)(4) (Michie 1997 & Supp. 1999); CAL. PENAL CODE § 189 (West 1999 & Supp. 2001); 720 ILL. COMP. STAT. ANN. 5/9-1(a)(3) (West 1993 & Supp. 2000); N.J. STAT. ANN. § 2C:11-3(a)(3) (West 1995 & Supp. 2001); N.Y. PENAL LAW § 125.25(3) (McKinney 1998 & Supp. 2001); *see also supra* note 25 (providing an extensive list of statutes that have adopted the felony-murder doctrine in some form).

34. LAFAVE & SCOTT, *supra* note 26, § 7.5, at 623.

35. MD. ANN. CODE art. 27, § 410.

36. Jackson v. State, 286 Md. 430, 435, 408 A.2d 711, 715 (1979) (citation omitted). The court in *Campbell v. State*, 293 Md. 438, 444 A.2d 1034 (1982), reiterated the point made in *Jackson*, that under the common-law felony-murder doctrine, malice is imputed to the defendant accomplice, regardless of whether the killing was accidental or intended. *Id.* at 441-42, 444 A.2d at 1037. However, the court went on to explain that under the agency theory of liability, malice cannot be imputed where the death is caused by a non-felon or a person attempting to thwart the crime. *Id.* at 443-44, 444 A.2d at 1038.

At common law, courts distinguished among the different participants in a crime as various degrees of either principals or accessories before the fact.[37] This distinction has been generally abolished by "statutes [which] provid[e] that all persons concerned in the commission of a felony, by directly committing the act or by aiding and abetting its commission, are guilty as principals."[38] Maryland took this approach and abolished the distinction between various degrees of accomplices before the fact, finding all participants of a felony guilty of first-degree murder when a death occurs.[39]

b. Felony-Murder Doctrines: Application of Agency Theory Versus Proximate Cause Theory.—The agency and proximate cause theories are the two primary standards that courts use to determine accomplice liability for felony-murder.[40] Under the agency theory, an accomplice can be found guilty of felony-murder for actions of co-felons that are within a common design and in furtherance of the felony.[41] An accomplice will not be found guilty of felony-murder for any action which is an independent product of the co-felon's mind, or for any act which is not in furtherance of the felony.[42] Under the proximate cause theory, an accomplice will be held liable for felony-murder if the death is foreseeable as a natural consequence of the felony.[43] The identities of both the person who is killed and the person who causes

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37. *See* Russell L. Wald, *Homicide Outside of Common Design*, 3 AM. JUR. 2D *Proof of Facts* 551 § 2 (1974 & 2000 Supp.) (citing 40 AM. JUR. 2D *Homicide* § 28 (1999) (pointing out that this distinction has been struck out by statutes that now place all participants in a crime under the category of "principal").

38. *Id.*

39. *See* MD. ANN. CODE art. 27, § 410 (listing the applicable underlying felonies for first-degree murder).

40. Jennifer DeCook Hatchett, Comment, *Kansas Felony Murder: Agency or Proximate Cause?*, 48 U. KAN. L. REV. 1047, 1051-52 (2000); *see* Erwin S. Barbre, *Criminal Liability Where Act of Killing Is Done by One Resisting Felony or Other Unlawful Act Committed by Defendant*, 56 A.L.R.3d 239, § 4-5 (1974) (discussing the agency and proximate cause theories as the two main standards under the felony-murder rule).

41. *See, e.g.*, Commonwealth v. Redline, 137 A.2d 472, 478 (Pa. 1958).

> No person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose.

Id. (quoting Commonwealth v. Campbell, 89 Mass. (1 Allen) 541, 544 (1863)).

42. *See Campbell*, 89 Mass. (1 Allen) at 545. Thus, the agency theory prevents an accomplice defendant from being found guilty for the death of any person, whether co-felon, victim, or bystander, who is killed by someone attempting to thwart the felony. *Id.*

43. *See* State v. Bridges, 628 A.2d 270, 280 (N.J. 1993) (stating that under the proximate cause theory, the "crime must be reasonably and closely connected to the conspiracy even though those crimes may not have been within the actual contemplation of the conspirators").

death are irrelevant because a defendant is liable if the events that occur during a felony are foreseeable.[44]

(1) Accomplice Liability Under Maryland's Felony-Murder Doctrine: The Proximate Cause Era.—Prior to 1982, Maryland applied the proximate cause theory to determine accomplice liability under the felony-murder doctrine.[45] The proximate cause theory enabled Maryland courts to find an accomplice liable for felony-murder if the death was foreseeable as a natural consequence of the felony.[46] Under the proximate cause theory, even if the co-felon did not personally inflict harm on a victim, an accomplice could be liable for felony-murder where the victim's death would not have occurred, absent the co-felon's conduct.[47] For example, in *Jackson v. State*,[48] the defendant and his accomplice, in an attempt to flee the scene of a robbery, used two of the robbery victims as shields during their escape.[49] While fleeing from the authorities in a vehicle, the police officers at a nearby roadblock shot at the vehicle, killing one of the robbery victims.[50] The court held that because the defendant and his accomplice had used the victims as human shields during their escape, they could be considered a direct cause of the death of the victim under the felony-murder rule because, but for the defendant's actions, the victim's death would not have occurred.[51]

Under the proximate cause theory, an accomplice is criminally liable for acts committed by a co-felon, not only during the course of

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44. *See id.* at 279-80. For example, under the proximate cause theory, if a police officer is killed by another police officer during a gun battle with the co-felons, the co-felons are guilty of felony-murder. *See* People v. Hernandez, 624 N.E.2d 661, 666 (N.Y. 1993).

45. *See, e.g.*, Burko v. State, 28 Md. App. 732, 736-37, 349 A.2d 355, 357-58 (1975) (employing proximate cause principles and determining that the defendant was criminally liable for the murder of a police officer because his co-felon's attempt to evade police was a natural and foreseeable consequence).

46. *See, e.g.*, Jackson v. State, 286 Md. 430, 441-43, 408 A.2d 711, 718-19 (1979) (finding that using a victim as a shield during an attempt to flee the scene of a felony was a proximate cause of the victim's death).

47. *See id.* at 441-42, 408 A.2d at 718.

48. 286 Md. 430, 408 A.2d 711 (1979).

49. *Id.* at 433-34, 408 A.2d at 713-14.

50. *Id.*

51. *Id.* at 442, 408 A.2d at 718. These "shield cases," in which the defendant uses the victim as a shield or places the victim in direct danger, serve as particularized exceptions under the agency theory as well. *See* Campbell v. State, 293 Md. 438, 451 n.3, 444 A.2d 1034, 1041 n.3 (1982). The *Campbell* court noted that under the agency theory, criminal liability for felony-murder will be imposed in shield cases, even if a non-felon actually caused the death. *Id.* The court found that a defendant cannot escape liability in these particular situations, because the direct and immediate harm to the victim was caused by the co-felons' actions. *Id.*

the felony, but also during the course of escape from the scene of a felony.[52] For example, in *Burko v. State*,[53] the court upheld the defendant's conviction for felony-murder where the principal co-felon, who was hiding inside the trunk of a car, shot an officer.[54] The *Burko* court reasoned that the defendant never alerted police to the presence of the principal when they were questioning him.[55] Furthermore, escaping apprehension by law enforcement officers is always an act that is in furtherance of the felony itself.[56] Thus, the proximate cause standard transfers liability to an accomplice for any death caused by the principal of a felony during an attempted escape.[57]

There are limitations under the proximate cause theory that restrict a defendant's liability. The primary limitation restricts defendants' criminal accountability to those deaths that occur within the common purpose of the felony.[58] The Court of Special Appeals applied this limitation in *Mumford v. State*.[59] The *Mumford* court held that because a defendant is only liable for felony-murder when the murder is within the common design of the felony that the accomplice conspired to commit, the trial judge erred by not instructing the jury of this causal nexus requirement within the felony-murder rule.[60] The court found that there was sufficient evidence for a jury to find that the victim's death occurred during the course of the rape of the victim by Mumford's co-felons and not during the burglary that the defendants conspired to commit.[61] Further, the court found that the jury should have considered the issue of whether the rape was within the common purpose of the burglary before they could hold the de-

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52. *See* Burko v. State, 28 Md. App. 732, 736, 349 A.2d 355, 357 (1975).

53. 28 Md. App. 732, 349 A.2d 355 (1975).

54. *Id.* at 736-37, 349 A.2d at 357.

55. *Id.* at 733-34, 349 A.2d at 355.

56. *See* Sheppard v. State, 312 Md. 118, 121-22, 538 A.2d 773, 774 (1988) ("As a general rule, when two or more persons participate in a criminal offense, each is responsible for the commission of the offense and for any other criminal acts done in furtherance of the commission of the offense or the escape therefrom.").

57. *See Burko*, 28 Md. App. at 736, 349 A.2d at 357.

58. *See, e.g.*, Mumford v. State, 19 Md. App. 640, 643, 313 A.2d 563, 566 (1974) (employing this limitation and holding that the defendant was not guilty for the actions of her co-felons where her co-felons killed the homeowner during the course of a rape, which was outside the common design of the burglary). This limitation is based on the premise that liability cannot be extended to murder where the only link between the original felony and the resulting murder is that both occurred at the same time and place. *See id.* at 644, 313 A.2d at 566.

59. 19 Md. App. 640, 313 A.2d 563 (1974).

60. *Id.* at 644, 313 A.2d at 566.

61. *Id.* at 643-44, 313 A.2d at 566.

fendant guilty of felony-murder.[62] Thus, a jury instruction was required regarding the common purpose of the felony.[63]

(2) States Adopt the Agency Theory: Pivotal Cases in Other Jurisdictions.—While Maryland courts used the proximate cause theory under the felony-murder rule, other jurisdictions have a long history of using the agency theory to determine accomplice liability. As early as 1863, states began following the agency theory to determine criminal liability under the felony-murder rule. In *Commonwealth v. Campbell*,[64] the Massachusetts Supreme Judicial Court adopted the agency theory, holding that the defendant, who had participated in a riot during which a participant was killed by soldiers attempting to suppress the riot, could not be found guilty of murder unless it could be shown that the defendant or another riot participant actually caused the death by his own conduct.[65] The court explained that "[n]o person can be held guilty of homicide unless the act is either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose."[66]

In 1958, Pennsylvania followed the *Campbell* decision and adopted the agency theory of accomplice liability in *Commonwealth v. Redline*.[67] In *Redline*, the court found that the defendant could not be held accountable for the death of a co-felon killed by a police officer, because the malice required for murder could not be imputed from the officer's justified killing.[68] The court found that "[t]he mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine."[69] Instead, the Govern-

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62. *Id.*

63. *See id.* In *Scott v. State*, 49 Md. App. 70, 430 A.2d 615 (1981), the court distinguished between *Mumford*-type cases, where the murder was committed during a felony that was outside of the conspiracy, and those cases in which there was no break in the chain of causation between the felony and the murder. *Id.* at 82, 430 A.2d at 621-22. In *Scott*, where a victim was killed by the defendant's accomplice after discovering a gun in the victim's possession, the court found that there was not only an unbroken chain of causation between the felony and the murder, but that there was also evidence that the murder was committed to facilitate the robbery, either by silencing the victim or by facilitating an escape. *Id.*, 430 A.2d. at 622.

64. 89 Mass. (1 Allen) 541 (1863).

65. *Id.* at 547.

66. *Id.* at 544.

67. 137 A.2d 472 (Pa. 1958).

68. *Id.* at 476. In so doing, the court implicitly rejected the proximate cause theory used in prior cases. The court, however, did not explicitly overrule such cases until its 1970 decision of *Commonwealth* ex rel. *Smith v. Myers*, 261 A.2d 550 (Pa. 1970) (overruling *Commonwealth v. Almeida*, 68 A.2d 595 (Pa. 1949)).

69. *Redline*, 137 A.2d at 476.

ment must show not only that the death occurred as a result of the felony, but that the death was in furtherance of the design to commit the felony.[70]

(3) Maryland Adopts the Agency Theory.—Following the lead of other jurisdictions, Maryland courts subsequently adopted the agency theory to determine criminal liability under the felony-murder rule. In *Campbell v. State*,[71] the Court of Appeals rejected the proximate cause theory, and found that while

> criminal culpability shall continue to be imposed for all lethal acts committed by a felon or an accomplice acting in furtherance of a common design[,] . . . criminal culpability . . . shall not be imposed for lethal acts of nonfelons that are not committed in furtherance of a common design.[72]

Campbell was convicted of first-degree murder for the death of his co-felon, who died as a result of gunshot wounds received during an attempted robbery of a taxicab driver.[73] During the robbery, the intended victim shot at Campbell's co-felon, wounding him.[74] A few moments after these shots were fired, an officer on foot patrol came to the assistance of the robbery victim and also shot at Campbell's co-felon, wounding him further.[75] It remained unclear which party fired the fatal shot.[76]

The Court of Appeals reversed Campbell's conviction based on its adoption of the agency theory.[77] In its decision, the court found that the agency theory limits criminal liability under felony-murder to only those deaths that occur at the hands of one of the co-felons and that are within the common design of the felony.[78] The court rea-

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70. *Id.*

71. 293 Md. 438, 444 A.2d 1034 (1982).

72. *Id.* at 451-52, 444 A.2d at 1042. Supporting its decision, the *Campbell* court borrowed language from the frequently cited passage in *Commonwealth v. Campbell*, 89 Mass. (1 Allen) 541 (1863), stating

> "that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable . . . for the acts of each and all who participate with him in the execution of the unlawful design."

Campbell, 293 Md. at 443-44, 444 A.2d at 1038 (quoting *Campbell*, 89 Mass. at 543-44).

73. *Campbell*, 293 Md. at 440, 444 A.2d at 1036.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.* at 452, 444 A.2d at 1042 (holding that under the agency theory, Campbell was not criminally liable for the actions of non-felons).

78. *Id.* at 449-50, 444 A.2d at 1040-41.

soned that holding felons criminally liable for acts of a non-felon does not help to promote the deterrence of criminal acts.[79] Based on such a policy, the court reversed Campbell's conviction, holding that because the killing was committed by a person in an attempt to thwart the felony, the killing was not in furtherance of an unlawful purpose.[80]

Since the *Campbell* decision, Maryland courts have applied the agency theory to various situations where a non-felon's actions were the direct cause of the resulting homicide. For example, in *Poole v. State*,[81] the court reversed Poole's conviction for the death of his co-felon, because the victim of the robbery was the person who killed the co-felon.[82] The court based its reasoning on the agency theory set forth in *Campbell*, finding that a co-felon could not be held criminally responsible for the lethal acts brought on by victims during the course of a robbery, because such acts were not in furtherance of the co-felons' common design.[83]

Maryland courts have carved out several exceptions to the agency theory. For example, in *Goldring v. State*,[84] the court upheld the defendant's conviction for two counts of second-degree murder where a bystander and race competitor were killed during a drag race.[85] The court reasoned that when a defendant's actions place another individual in direct danger of being harmed, the defendant may be held criminally liable for any harm to that individual.[86] In *Alston v. State*,[87] the Court of Appeals found that gun battles between individuals on public streets constitute another exception to the agency theory.[88] In *Alston*, the defendant and another individual exchanged gunshots on a public street.[89] During the incident, a bystander was killed by a stray bullet fired from the gun of the defendant's opponent.[90] The Court of Appeals upheld the defendant's conviction for the bystander's death because he had intentionally committed acts that were likely to

79. *Id.* at 450, 444 A.2d at 1041.

80. *Id.* at 451-52, 444 A.2d at 1042.

81. 295 Md. 167, 453 A.2d 1218 (1983).

82. *Id.* at 174-75, 453 A.2d at 1223.

83. *Id.*

84. 103 Md. App. 728, 654 A.2d 939 (1995).

85. *Id.* at 738, 654 A.2d at 944.

86. *See id.* at 737, 645 A.2d at 943 (citing *Campbell*'s reasoning for creating an exception for "shield" cases and finding such reasoning analogous to cases involving drag racing).

87. 339 Md. 306, 662 A.2d 247 (1995).

88. *See id.* at 316, 662 A.2d at 252 (analogizing a gun battle to the drag racing scenario in *Goldring* in order to carve out an additional exception to the agency theory).

89. *Id.* at 308, 662 A.2d at 248.

90. *Id.*

kill others.[91] The court found that in such situations, a defendant is criminally liable for the death of a bystander, even if his opponent actually caused the death, because both participants acted with conscious disregard for the life of innocent parties.[92]

c. The Road Back to Proximate Cause: States Reject Agency Theory in Favor of Proximate Cause.—At least two states, Illinois and New York, have abandoned the agency theory and have adopted the proximate cause standard of vicarious liability for felony-murder.[93] Both states have found that the agency theory does not allow juries to adequately punish criminals who were ultimately responsible for the death of another due to their participation in a felony.[94]

In *People v. Payne*,[95] the Supreme Court of Illinois, without explicitly overruling previous Illinois cases that had followed the agency theory,[96] implicitly adopted the proximate cause theory for accomplice liability.[97] In *Payne*, the defendant was convicted of felony-murder after one of the two robbery victims was fatally shot during a gun battle between the victims and the robbers; however, it was unclear whether the fatal shot came from one of the co-felons or from the other vic-

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91. *Id.* at 319, 662 A.2d at 253.

92. *Id.*

93. *See generally* People v. Payne, 194 N.E. 539, 543 (Ill. 1935) (holding that where a killing is committed in pursuit of a felony, the offense is deemed to be murder); People v. Hernandez, 624 N.E.2d 661 (N.Y. 1993). In *Hernandez*, the New York Court of Appeals expressly overruled its previous decision in *People v. Wood*, 167 N.E.2d 736, 739 (N.Y. 1960), in which the court had adopted the agency theory. *Id.* at 663. The court found that when the New York legislature revised the felony-murder doctrine in 1965 to include those acts by a defendant or an accomplice that "cause[ ] the death of a person other than one of the participants," it had intended that proximate cause replace the agency theory. *Id.* Unlike the *Hernandez* court, the Illinois Supreme Court's ruling in *Payne* did not expressly adopt the proximate cause theory. *See generally Payne*, 194 N.E. 539 (Ill. 1935). However, in *People v. Lowery*, 687 N.E.2d 973 (Ill. 1997), the Illinois Supreme Court finally explained that *Payne* was Illinois's first application of the proximate cause theory, and that *Payne* had created the starting point of a gradual acceptance of the proximate cause theory by later courts. *Id.* at 976.

94. *See, e.g., Lowery*, 687 N.E.2d at 976-77 (finding that neither the intent of Illinois's felony-murder doctrine, nor the fundamental principles of criminal law, are served unless defendants are held accountable for all foreseeable consequences of their actions); *Hernandez*, 624 N.E.2d at 665-66 (finding that the proximate cause theory facilitates the punishment of co-felons who are ultimately responsible for the killing, while not punishing those co-felons to an unreasonable degree).

95. 194 N.E. 539 (Ill. 1935).

96. *See* Butler v. People, 18 N.E. 338, 340 (Ill. 1888) (applying the agency theory and finding that defendants were not responsible for a death that had occurred as a result of a policeman's shooting).

97. *See Payne*, 194 N.E. at 543 (finding that there are certain acts that may be reasonably anticipated to occur during a felony, such as a violent act against a person resisting the felony).

tim.[98] The court upheld Payne's conviction, reasoning that "[i]t reasonably might be anticipated that an attempted robbery would meet with resistance, during which the victim might be shot either by himself or some one else in attempting to prevent the robbery, and those attempting to perpetrate the robbery would be guilty of murder."[99]

Illinois courts slowly began to expand *Payne*'s "reasonably anticipated" standard.[100] In *People v. Hickman*,[101] the Supreme Court of Illinois upheld a defendant's murder conviction for the accidental killing of a police officer by another officer, both of whom were attempting to apprehend the co-felons as they fled the scene of a burglary.[102] The court held that the defendant was guilty of felony-murder because he should have anticipated that officers would attempt to thwart the felony.[103] The court reasoned that a defendant does not have to anticipate the precise sequence of events that follow from his actions; it is enough that his actions cause the consequences that follow.[104]

Decades after the *Payne* decision, Illinois courts began to expressly follow the proximate cause theory. For example, in *People v. Lowery*,[105] the Supreme Court of Illinois expressly stated its intent to follow the proximate cause theory of liability.[106] In so doing, the court pointed out that the *Payne* decision was Illinois's first application of the proximate cause theory and had laid the groundwork for later cases such as *Hickman*.[107]

While Illinois slowly adopted the proximate cause theory through a series of cases, New York explicitly adopted the theory.[108] In its 1993

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98. *Id.* at 541.

99. *Id.* at 543 (citing People v. Krauser, 146 N.E. 593 (Ill. 1925)).

100. *See, e.g.*, People v. Hickman, 319 N.E.2d 511, 513-14 (Ill. 1974) (expanding the standard to include criminal liability for the killing of one police officer by another police officer while attempting to thwart a burglary).

101. 319 N.E.2d 511 (Ill. 1974).

102. *Id.* at 513. In *Hickman*, one police officer accidentally shot another officer after mistaking the second officer for one of the co-felons who he thought was carrying a gun. *Id.* at 512.

103. *Id.* at 513.

104. *Id.*

105. 687 N.E.2d 973 (Ill. 1997).

106. *Id.* at 975 ("In considering the applicability of the felony-murder rule where the murder is committed by someone resisting the felony, Illinois follows the 'proximate cause theory.'"). The court upheld Lowery's conviction of felony-murder where one of his victims accidentally shot a bystander in an effort to thwart Lowery's escape. *Id.*

107. *See id.* at 976.

108. *See* People v. Hernandez, 624 N.E.2d 661, 665 (N.Y. 1993) (discussing the policy reasons for adopting the proximate cause theory, and stating that "[u]nlike . . . those courts adopting the so-called agency theory, we believe New York's view of causality, based

decision, *Hernandez v. Santana*,[109] New York abrogated its use of the agency theory and adopted the proximate cause theory.[110] In *Hernandez*, during the co-felons' attempted escape from the scene of an attempted robbery, a gun battle ensued between the co-felons and law enforcement officers, and a police officer was fatally wounded by another police officer's gun fire.[111] Upholding Hernandez's conviction for felony-murder, the court based its decision on its application of the proximate cause standard.[112] The court reasoned that an escape attempt from the scene is a foreseeable consequence of a felony and within the furtherance of a co-felon's criminal objective.[113] Further, the court found that it also was reasonably foreseeable that when a co-felon attempts to escape the scene of a felony, a police officer will attempt to thwart the crime.[114]

After the *Hernandez* decision, New York courts interpreted the proximate cause theory to include deaths that occur as a result of the defendant's conduct, even if the harm was never inflicted by a particular person.[115] For example, in *People v. Matos*,[116] where an officer attempting to apprehend the defendant was killed after falling twenty-five feet down an airshaft, the Court of Appeals of New York upheld the defendant's conviction because his flight from the felony directly caused the officer's death.[117] The court noted that the foreseeability component of the proximate cause theory does not require that the defendant foresee the most likely event, only that the defendant's actions are the direct cause of the resulting death.[118]

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on a proximate cause theory, to be consistent with fundamental principles of criminal law").

109. 624 N.E.2d 661 (N.Y. 1993).

110. *Id.* at 663 (finding that when the New York legislature revised the felony-murder doctrine in 1965 to include those acts by a defendant or an accomplice that "cause the death of a person other than one of the participants," the legislature intended for proximate cause to replace the use of the agency theory).

111. *Id.* at 662.

112. *Id.* at 666. The court noted that "[f]oreseeability does not mean that the result must be the most likely event." *Id.* However, the court found that it was foreseeable that police would attempt to thwart a crime and that violence then might ensue. *See id.*

113. *Id.*

114. *Id.*

115. *See* People v. Matos, 634 N.E.2d 157, 158 (N.Y. 1994) (upholding the defendant's murder conviction where an officer, attempting to apprehend the defendant, was killed after falling down an airshaft).

116. 634 N.E.2d 157 (N.Y. 1994).

117. *Id.* at 157-58.

118. *Id.* at 158 (citing *Hernandez* and pointing out that the direct cause of a homicide includes deaths that occur during the attempted flight from the scene of the felony).

New York and Illinois are examples of states that have rejected the agency theory in favor of the proximate cause theory, whether by express adoption or by a gradual progression. The precedent set in both these states show the ease with which a state can abandon the agency theory and adopt the proximate cause theory.

3. The Court's Reasoning.—In *Watkins v. State*, the Court of Appeals affirmed the defendant's conviction, finding that the trial court's jury instructions were adequate because they clearly stated what the State was required to prove—that the killing of Hilliard was in furtherance of the robbery of Whittington.[119] Further, the court found that the defendant did not demonstrate a legitimate dispute over whether the killing of Hilliard was outside the furtherance of the robbery of Whittington, raising no need for a separate "Mumford-type instruction."[120]

Writing for a unanimous court, Judge Wilner first discussed the intricacies of the "common design" portion of the felony-murder rule.[121] The court emphasized the language of Article 27, section 410 of the Maryland Code,[122] and pointed out that it has "long been established that, under the felony-murder doctrine, a participating felon is guilty of murder when a homicide has been committed by a co-felon in furtherance of the underlying felony."[123] Then, relying on *Mumford v. State*,[124] the court acknowledged that a jury instruction regarding the common design of the felony is only required when there is a legitimate dispute for the jury to resolve regarding whether a killing was in furtherance of the common design of each co-felon.[125]

The court next turned to a discussion of the agency theory as a means of assigning guilt to accomplices under the felony-murder rule.[126] The court pointed out that the agency theory assigns guilt by

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119. *Watkins*, 357 Md. at 273, 744 A.2d at 9.

120. *Id.*

121. *Id.* at 266, 744 A.2d at 5. The court had serious doubts as to whether one of the victims, Derrick Hilliard, was originally a co-felon in the robbery or a second victim of the robbery. *Id.* at 264, 744 A.2d at 4. However, the court did not delve into this issue further, because it found that its reasoning would be the same, regardless of whether Hilliard was a victim or a co-felon. *Id.*

122. *Id.* at 267, 744 A.2d at 5; *see* MD. ANN. CODE art. 27, § 410 (2000).

123. *Watkins*, 357 Md. at 267, 744 A.2d at 6 (citing Campbell v. State, 293 Md. 438, 442, 444 A.2d 1034, 1037 (1982)).

124. 19 Md. App. 640, 313 A.2d 563 (1974).

125. *Watkins*, 357 Md. at 266, 744 A.2d at 5; *see also Mumford*, 19 Md. App. at 643-44, 313 A.2d at 566 (finding that a jury instruction should have been given regarding the nexus between the original felony and homicide because there was sufficient evidence for a jury to conclude that the co-felons' actions were outside the common design of the felony).

126. *Watkins*, 357 Md. at 268-70, 744 A.2d at 6-7.

making a person who engages in the commission of an unlawful act "'responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable . . . for the acts of . . . all who participate with him in the execution of the unlawful design.'"[127] The court reiterated its position held in *Campbell v. State*,[128] rejecting the proximate cause theory of liability in favor of the agency theory on the basis that the proximate cause theory is too broad for criminal proceedings and does not "further the basic purpose of the [felony-murder] doctrine, of 'deterring felons from killing by holding them strictly responsible for killings they or their co-felons commit.'"[129]

After the court discussed the dangers of using the proximate cause theory to determine criminal liability, it stated that the agency theory contains a limitation on criminal liability—a particular act of one co-felon must have been done "'for the furtherance . . . of the common object and design for which they combined together.'"[130] The court then restated the inference made by courts of other jurisdictions that when applying the agency theory, "'[i]n order to convict for felony-murder, the killing must have been done by the defendant or by an accomplice . . . or by one acting in furtherance of the felonious undertaking.'"[131]

The court then rejected Watkins's attempts at placing the killing of Hilliard outside the common design of the crime, and thus, within the safe harbor of the agency theory, because there was no evidence to support such assertions.[132] The court further rejected Watkins's attempts at relying on *People v. Sobieskoda*[133] as persuasive authority to prove that the killing of Hilliard was outside the common design of

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127. *Id.* at 269, 744 A.2d at 6-7 (quoting Commonwealth v. Campbell, 89 Mass. (1 Allen) 541, 543 (1863)).

128. 293 Md. 438, 444 A.2d 1034 (1982).

129. *Watkins*, 357 Md. at 270, 744 A.2d at 7 (quoting *Campbell*, 293 Md. at 450, 444 A.2d at 1040).

130. *Id.* at 269, 744 A.2d at 7 (quoting *Campbell*, 89 Mass. (1 Allen) at 543).

131. *Id.* at 269-70, 744 A.2d at 7 (emphasis omitted) (quoting Commonwealth v. Redline, 137 A.2d 472, 476 (Pa. 1958)).

132. *Id.* at 271, 744 A.2d at 8.

133. 139 N.E. 558, 560 (1923) (finding that an accomplice may be found guilty of felony-murder not when the act is simply done during the commission of a felony, but also when the act is part of the common design of the felony). In *Sobieskoda*, the defendant was convicted of murder after he and his co-felon conspired to kill a man, but during the course of their attempts to kill the intended victim, the defendant's co-felon accidentally shot and killed a different man. *Id.* at 550. The court reversed Sobieskoda's conviction because the trial court should have instructed the jury to decide whether the killing was an independent product of the co-felon's mind. *Id.* at 560.

the conspiracy.[134] The court reasoned that *Sobieskoda* was distinguishable because the evidence in that case left open the possibility that the co-felon acted on a private purpose, wholly unrelated to the felony, whereas the evidence present in *Watkins* did not allow the inference that the actions of Watkins's accomplice, Eric Jenkins, were the result of an independent purpose.[135]

Finally, the court turned to the question of foreseeability. The court rejected Watkins's claim that the killing of an accomplice was not foreseeable and thus outside the limits of vicarious liability in felony-murder situations.[136] The court reasoned that actual foreseeability was not the appropriate test to be used, because actual foreseeability was within the realm of the proximate cause theory, which the court had rejected in *Campbell*.[137]

The court also emphasized that actual foreseeability has no place within the agency theory.[138] Rather, the agency theory uses an "implicitly foreseeable" standard.[139] The court attempted to distinguish between actual and implicit foreseeability, stating that "there is a range of conduct that the law regards as implicitly foreseeable, whether or not the prospect of that conduct was ever actually anticipated."[140] Based on the implicitly foreseeable standard, the court rejected Watkins's claim that the killing of an accomplice was not foreseeable and found that the killing of Hilliard was in furtherance of the felony because he was killed to eliminate a witness to a robbery.[141]

4. Analysis.—While attempting to clarify the agency theory set forth in *Campbell v. State*, *Watkins*'s "implicitly foreseeable" standard actually expands criminal liability under the felony-murder rule. Thus, the court broadened the agency theory by including actions of co-felons that are implicitly foreseeable to the defendant.[142] In so doing, *Watkins* shifts Maryland's standard for accomplice liability closer to the proximate cause theory.[143] Furthermore, by not defining the

134. *Watkins*, 357 Md. at 271, 744 A.2d at 8.
135. *Id.* at 272, 744 A.2d at 8.
136. *Id.* at 273, 744 A.2d at 9.
137. *Campbell*, 293 Md. at 447-52, 444 A.2d at 1039-42.
138. *Watkins*, 357 Md. at 273, 744 A.2d at 9.
139. *Id.*
140. *Id.*
141. *Id.*
142. *See id.* (holding that the killing of a witness is "necessarily in furtherance of the common [felonious] enterprise").
143. *See infra* notes 156-165 and accompanying text (discussing the expansion of the agency theory by the *Watkins* court).

boundaries and the limitations of the implicitly foreseeable standard, the court opens the door for future application of the proximate cause standard.[144] Thus, *Watkins* may mark the start of Maryland's gradual regression back to a proximate cause theory for determining criminal liability under the felony-murder doctrine.[145]

a. The Agency/Proximate Cause Spectrum.—The *Watkins* court's "implicitly foreseeable" standard extended accomplices' criminal liability under the agency theory by increasing the likelihood that a co-felon's actions will be viewed as within the common design of the felony.[146] By using this subset of forseeability to define accomplice liability under the felony-murder rule, the court implicitly brought Maryland away from a pure agency theory.[147] As such, *Watkins* places the Maryland standard somewhere in the vague middle on the agency/proximate cause spectrum.[148]

On one side of the spectrum is the agency theory, in its pure form, under which an accomplice is guilty of felony-murder for actions of co-felons that are within the common design and in furtherance of the felony.[149] Under the agency theory, an accomplice cannot be held guilty of felony-murder for any action that is an independent product of the co-felon's mind, or for any situation that cannot be considered in furtherance of the felony.[150] Thus, in its pure form, the agency theory prevents an accomplice from being held guilty for the

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144. *See infra* notes 180-184 and accompanying text.

145. *See infra* notes 185-193 and accompanying text.

146. *See supra* notes 132-135 and accompanying text (noting the court's rejection of Watkins's claim that his co-felon's actions were outside the common design of the robbery).

147. *See Watkins*, 357 Md. at 273, 744 A.2d at 9 (employing an "implicitly foreseeable" standard within its analysis). Agency theory in its pure form parallels the agency theory used by courts in cases such as *Redline* and *Campbell*. *See supra* notes 64-70 and accompanying text (discussing *Commonwealth v. Redline*, 137 A.2d 472 (Pa. 1958), and *Commonwealth v. Campbell*, 89 Mass. (1 Allen) 541 (1863)).

148. *See Watkins*, 357 Md. at 273, 744 A.2d at 9 (attempting to distinguish between the foreseeability test used under the proximate cause theory and the "implicitly foreseeable" standard articulated by the court for the agency theory, without providing any boundary lines between the two tests). When a court uses language that is normally used to define liability under the proximate cause theory—such as language of foreseeability—and applies this language to define the boundaries of the agency theory, what results is a muddling of the two theories to the point where they may become indistinguishable. *See id.* (citing only examples of what is foreseeable, but not actually defining the boundary lines between actual and implicit foreseeability).

149. *See, e.g., Redline*, 137 A.2d at 483 (adopting the agency theory and finding that the defendant could not be found guilty of murder for the death of his co-felon where his co-felon was killed by a police officer); *Campbell*, 89 Mass. (1 Allen) at 545-47 (employing the agency theory and finding that a rioter cannot be found guilty of murder if the victim was killed by a soldier in self-defense).

150. *See Campbell*, 89 Mass. (1 Allen) at 544-45.

death of any person, whether co-felon, victim, or bystander, who is killed by someone attempting to thwart the felony.[151]

On the opposite side of the spectrum is the proximate cause theory of liability under the felony-murder doctrine. Proximate cause holds an accomplice liable for felony-murder if the death is foreseeable as a natural consequence of the felony.[152] Under this theory, it is irrelevant who actually caused the death, whether it be a co-felon or a person attempting to thwart the felony.[153] If the death occurred as a direct result of events that might foreseeably occur during a felony, then the accomplice defendant can be held liable for felony-murder.[154] For example, if a police officer is killed by another police officer during a gun battle with co-felons, the co-felons can be held guilty of felony-murder for the death of the police officer.[155]

While one theory may not necessarily be better than the other, for precedent to remain consistent, a court must consider its underlying policy for favoring one theory over the other.[156] Unfortunately, it is questionable whether the *Watkins* court considered its underlying policy when it created the "implicitly foreseeable" standard.[157] The *Watkins* court stated that it preferred application of the agency theory because the proximate cause standard was overly broad and did not deter crime to any greater degree as compared with the agency theory.[158] In expanding the agency theory to acts that are implicitly foreseeable, the court hindered its underlying policy by broadening the scope of a defendant's liability.[159]

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151. *See id.*

152. *See* State v. Bridges, 628 A.2d 270, 280 (N.J. 1993) (affirming the defendant's conviction because the gun shots that killed the victim were a natural and foreseeable consequence of a fight that the defendant provoked).

153. *See id.*

154. *See id.* (holding a defendant criminally liable if the defendant set into motion the chain of events that eventually resulted in a homicide).

155. *See, e.g.*, People v. Hernandez, 624 N.E.2d 661, 666 (N.Y. 1993) (discussing the liability of a defendant for the death of a police officer, which was caused during a gun battle between the defendant and police).

156. *See, e.g., Campbell*, 89 Mass. (1 Allen) at 544 (stating that one of its policy reasons for applying the agency theory is to assure that a defendant is not held responsible for uncontemplated actions, and then finding that the defendant could not be held responsible for a homicide committed by another when that death was outside the common design of the riot).

157. *See Watkins*, 357 Md. at 270, 744 A.2d at 7 (noting that policy considerations for adopting the agency theory in *Campbell* included the overly-broad liability possible under the proximate cause theory, as well as the questionable link between the proximate cause theory and deterrence of criminal conduct).

158. *Id.*

159. *See id.* at 273, 744 A.2d at 9.

Unlike the *Watkins* court, courts in other states that currently follow the agency theory have shied away from using foreseeability, whether actual or implicit, as a standard for determining a defendant's liability.[160] These states do not muddle the agency theory with proximate cause concepts such as foreseeability. When a court confuses the agency theory with terms such as foreseeability, the result is an expansion of the agency theory.[161] Foreseeability implies that fewer actions by co-felons would be considered an independent product outside the common design of the felony, because an accomplice can implicitly foresee countless actions. For example, under the pure form of the agency theory, an accomplice could not be held liable for the death of a person during a riot unless the death was at the hands of the defendant or another rioter.[162] However, under the *Watkins* standard, a co-conspirator of a riot may be held liable for the death of a victim during a riot, whether caused by one participating in the riot or by another, because it may be implicitly foreseeable that such an event could occur during the riot.[163] This distinction demonstrates that the agency theory expands when a court attempts to apply the principles of foreseeability to rationalize accomplice liability for the actions of co-felons.

While the *Watkins* court indicated that Maryland has not endorsed the proximate cause standard,[164] the court's use of the "implicitly foreseeable" standard implies that Maryland no longer follows the agency theory in its pure form.[165] Thus, by extending the agency theory through the use of an "implicitly foreseeable" standard, the *Watkins* court moves Maryland's standard for accomplice liability into the vague middle on the agency/proximate cause spectrum.

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160. *See, e.g.*, Commonwealth v. Redline, 137 A.2d 472, 476-78 (Pa. 1958) (limiting the boundaries of the agency theory to those homicides committed by co-felons, and abandoning any discussion of the applicability of foreseeability within the agency theory).

161. *See* People v. Payne, 194 N.E. 539, 543 (Ill. 1935) (expanding criminal liability by finding that a defendant is liable where he could have reasonably anticipated events to occur that could result in death); People v. Hickman, 319 N.E.2d 511, 513-14 (Ill. 1974) (expanding criminal liability under the "reasonably anticipated" test of *Payne* to include actions by non-felons attempting to thwart the felony); People v. Lowery, 687 N.E.2d 973, 976 (Ill. 1997) (finding that *Payne* implicitly had adopted the proximate cause theory by using the phrase "reasonably anticipated").

162. *See* Commonwealth v. Campbell, 89 Mass. (1 Allen) 541, 544 (1863) (holding that the defendant could not be held guilty for the death of the victim because it had not been caused by the defendant or a fellow rioter).

163. *See Watkins*, 357 Md. at 273, 744 A.2d at 9. Such events could be included under the "range of conduct" that the court finds "implicitly foreseeable."

164. *See id.* at 268-70, 744 A.2d at 6-7.

165. *See id.* at 273, 744 A.2d at 9.

b. Lack of Boundaries for Implicitly Foreseeable Acts May Open the Door for the Proximate Cause Theory.—*Watkins*'s "implicitly foreseeable" standard expanded the agency theory and moved Maryland away from that theory's "pure form." However, the court's failure to indicate the boundaries and limitations of the standard will cause confusion in applying the standard, thereby opening the door for the proximate cause theory. As such, the "implicitly foreseeable" standard of *Watkins* could mark the starting point of a gradual regression back to the application of proximate cause theory under Maryland's felony-murder doctrine.

Maryland would not be the first state to revert back to using the proximate cause theory.[166] New York courts, originally following the agency theory, came full circle and expressly adopted the proximate cause theory.[167] In *People v. Hernandez*,[168] the New York Court of Appeals rejected the agency theory and held that proximate cause was the new standard to use under the felony-murder doctrine.[169] The court found that the proximate cause theory is consistent with the "fundamental principles of criminal law"[170] because it holds a defendant responsible for actions that are a direct cause of a person's death.[171] The court also found that the proximate cause theory would not unreasonably extend criminal liability of defendants, but instead would only extend liability to those events that might foreseeably occur during the course of a felony.[172] Thus, the *Hernandez* court held that the proximate cause theory was a valid extension of criminal liability and should be applied as the standard for determining culpability under the felony-murder doctrine.[173]

Unlike New York's express adoption of the proximate cause theory in *Hernandez*, Maryland's regression back to proximate cause will most likely occur, if at all, as a result of a slow expansion of criminal

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166. *See* People v. Hernandez, 624 N.E.2d 661, 665-66 (N.Y. 1993) (abandoning the agency theory in favor of the proximate cause theory after reviewing the legislative intent behind the revised felony-murder statute); *Payne*, 194 N.E. at 543 (beginning Illinois's shift back to the proximate cause theory by finding that certain events are "reasonably anticipated" to occur).

167. *See Hernandez*, 624 N.E.2d at 663.

168. 624 N.E.2d 661 (1993).

169. *Id.* at 663. The court found that when the New York legislature revised the felony-murder doctrine in 1965 to include those acts by a defendant or an accomplice that "caused the death of a person other than one of the participants," the legislature intended for proximate cause to replace the use of the agency theory. *Id.*

170. *Id.* at 665.

171. *Id.*

172. *See id.* (pointing out that criminal liability under the proximate cause theory is still limited to only those events that are a direct cause of the death, not merely coincidences).

173. *See id.*

liability, akin to Illinois's adoption of proximate cause.[174] Unlike New York's outright decision to use the agency theory, Illinois's decision to revert to the proximate cause theory was much more subtle.[175] The Illinois Supreme Court gradually dissolved the agency theory by failing to clarify the boundaries of broad phrases used in applying that theory.[176] In *People v. Payne*,[177] the court found that there are situations that are "reasonably anticipated" to occur during a felony, such as a victim's resistance and consequent death.[178] This standard extended the criminal liability of an accomplice by reducing the likelihood that a co-felon's actions are an independent product outside the common design of the felony.[179]

The reasoning of the *Payne* court is very similar to the reasoning in *Watkins*.[180] While the *Watkins* court refers to an "implicitly foreseeable" test instead of a "reasonably anticipated" test, both seem to hold an accomplice liable for events that are likely to occur during a felony.[181] In *Watkins*, the court stated that there is a "range of conduct"[182] that is implicitly foreseeable—a broad phrase that implies that there are many situations which should be regarded as implicitly foreseeable to the accomplice. However, the court never actually defined the boundaries and limitations of that "range of conduct." Like the court in *Payne*, the *Watkins* court expanded Maryland's agency theory by using the term, "implicitly foreseeable," but merely gave examples of when this rule creates liability on the part of the defendant.[183] In fact, the court gave examples very similar to those given in *Payne*, citing that the deaths of victims, witnesses, and innocent bystanders

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174. *Cf. supra* notes 95-107 and accompanying text (discussing Illinois's gradual progression in adopting the proximate cause theory).

175. *See Hernandez*, 624 N.E.2d at 666.

176. *See* People v. Payne, 194 N.E. 539, 543 (Ill. 1935). In *Payne*, the court used the phrase, "reasonably might be anticipated that an attempted robbery would meet with resistance," to indicate that the defendant accomplice could have foreseen the resistance and death of a victim during a robbery and thus could be found guilty of murder. *Id.*

177. 194 N.E. 539 (Ill. 1935).

178. *Id.* at 543.

179. *See id.*

180. *Compare id.* (stating the court's "reasonably anticipated" test and merely giving examples to explain this standard), *with Watkins*, 357 Md. at 273, 744 A.2d at 9 (stating the court's "implicitly foreseeable" standard and merely giving examples to explain this standard).

181. *See Watkins*, 357 Md. at 273, 744 A.2d at 9; *Payne*, 194 N.E. at 543.

182. *Watkins*, 357 Md. at 273, 744 A.2d at 9.

183. *See id.*

during the course of committing a felony are all events that are implicitly foreseeable to a defendant.[184]

These similarities are very important when considered in light of the precedent that *Payne* set in Illinois for future felony-murder cases. After *Payne*, the Illinois Supreme Court began to gradually add to the list of events it considered "reasonably anticipated" and found defendants criminally liable for actions by people other than the co-felons themselves that were foreseeable consequences of the initial felony.[185] Using phrases such as "foreseeable consequences," the Illinois courts' analyses and conclusions of liability in murder cases began to mirror the proximate cause theory of liability.[186] For example, the court in *People v. Hickman*[187] used *Payne*'s reasoning to extend accomplice liability to any events that are a direct and foreseeable consequence of the felony.[188] Eventually, courts, such as the court in *People v. Lowery*,[189] began to expressly state that the Illinois standard for determining accomplice liability was proximate cause, based on the precedent set by *Payne*'s "reasonably anticipated" test.[190] In *Lowery*, the court pointed out that *Payne* had laid the path for cases such as *Hickman* and Illinois's use of the proximate cause theory of liability.[191] Thus, the court acknowledged that the *Payne* decision opened the door to Illinois's reversion back to proximate cause.[192]

Illinois's case law after *Payne*'s "reasonably anticipated" test shows that it is not a far stretch to assume that the "implicitly foreseeable" standard set by *Watkins* could inevitably lead the court back to the

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184. *See id.*; *Payne*, 194 N.E. at 543 (explaining that the deaths of victims or other non-felons are events that are reasonably foreseeable).

185. *See* People v. Hickman, 319 N.E.2d 511, 513-14 (Ill. 1974) (extending the reasonably anticipated test of *Payne* to include those events that are a foreseeable consequence of a felony, such as the killing of one police officer by another while attempting to thwart the felony, because police intervention is foreseeable).

186. *See id.* (holding that the killing of one police officer by another during an attempted apprehension of co-felons was a foreseeable consequence of the defendant's actions, but still not expressly stating that Illinois follows the proximate cause theory); People v. Lowery, 687 N.E.2d 973, 976-78 (Ill. 1997) (affirming the defendant's conviction of felony murder for the accidental killing of an innocent bystander by the robbery victim during his struggle with the co-felons because the defendant set into motion a foreseeable chain of events).

187. 319 N.E.2d 511 (Ill. 1974).

188. *See id.* at 513-14 (citing *Payne* and finding that the defendant could be held liable for the death of a police detective where the detective was accidentally killed by another police officer who was attempting to prevent the defendant's escape).

189. 687 N.E.2d 973, 976 (Ill. 1997).

190. *See id.* at 976.

191. *See id.* (explaining that the analysis in *Payne* demonstrates that it was, in fact, Illinois's first application of the proximate cause theory).

192. *See id.*

proximate cause standard for determining accomplice liability under the felony-murder doctrine. The similarities between *Watkins* and *Payne*, as well as the precedent set by *Payne* in Illinois, illustrate that the Court of Appeals's failure to define the boundaries of the *Watkins* standard will create problems in identifying future cases that fall within the court's "implicitly foreseeable" standard.[193] As a result, like the standard in *Payne*, the *Watkins* standard eventually might open the door for a slow regression back to proximate cause.

5. Conclusion.—The court's expansion of the agency theory for accomplice liability in *Watkins v. State* to situations that are "implicitly foreseeable" during a felony has already placed Maryland's standard for accomplice liability closer toward the use of proximate cause along the agency/proximate cause spectrum of accomplice liability. Because the court did not define the boundaries of the implicitly foreseeable standard, the court has facilitated Maryland's likely transition back to the standard of proximate cause.

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193. *See Watkins*, 357 Md. at 273, 744 A.2d at 9 (affirming Watkins's conviction because a co-felon's killing of a witness was "implicitly foreseeable"); *see* People v. Payne, 194 N.E. 539, 543 (Ill. 1935) (affirming the defendant's conviction because a victim's resistance and resulting death was an event that could be reasonably anticipated to occur during the perpetration of a felony).

B. Eroding Due Process by Denying the Mistake-of-Age Defense to Statutory Rape

In *Owens v. State*,[1] the Court of Appeals of Maryland considered whether, under the Fourteenth Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights, the defendant's due process rights had been violated when he was denied the opportunity to present a reasonable mistake-of-age defense to a charge of statutory rape.[2] Although the underage victim was prepared to testify at trial that she had misled the defendant and had told him that she was above the age of statutory consent before they engaged in sexual intercourse, the court found no constitutional violation in denying the defendant's mistake-of-age defense under Maryland's statutory rape law.[3] The majority reasoned that the state had an overwhelming interest in protecting children from sexual exploitation, and that the statutory rape law furthered this interest without significant intrusion on innocent conduct.[4] More specifically, the court reasoned that the state's compelling interest in protecting children from harm outweighed any due process concerns of the defendant.[5] Therefore, the court upheld the constitutionality of the statute and found that the risk of intimate relations with a minor rested

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1. 352 Md. 663, 724 A.2d 43 (1999).

2. *Id.* at 669, 724 A.2d at 46; *see also infra* text accompanying note 22 (providing the relevant text of the Due Process Clause of the Fourteenth Amendment); text accompanying note 23 (providing the relevant text of Article 24 of the Maryland Declaration of Rights).

3. *Owens*, 352 Md. at 667, 724 A.2d at 45.

4. *Id.* at 685, 724 A.2d at 54. The Due Process Clause of the Fourteenth Amendment protects both procedural and substantive rights. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990) (acknowledging the procedural and substantive components of a due process claim with respect to a section 1983 claim); McKinney v. Pate, 20 F.3d 1550, 1556-57 (11th Cir. 1994) (discussing and distinguishing the Fourteenth Amendment's substantive due process rights from procedural rights). Generally, due process challenges are analyzed under either a rational basis or a strict scrutiny standard. United States v. Brandon, 158 F.3d 947, 956 (6th Cir. 1998) (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.6, at 347-48 (5th ed. 1995)). If a state action burdens a fundamental right, strict scrutiny is triggered, and the law will be struck down unless it is shown to be the least burdensome means of achieving a compelling governmental interest. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (discussing due process analysis and applying strict scrutiny to the fundamental right of privacy). Where fundamental rights are not involved, the government action will survive constitutional analysis if the law is rationally related to a legitimate state interest. *See, e.g.*, Vacco v. Quill, 521 U.S. 793, 799 (1997) (applying the rational basis standard to uphold New York's laws that prohibited assisted suicide, which involved neither fundamental rights nor suspect classifications).

5. *Owens*, 352 Md. at 689-90, 724 A.2d at 56.

squarely on the shoulders of the older party, despite that party's reasonable belief regarding the child's age.[6]

Owens undoubtedly is commendable for its honorable intentions regarding children's physical and mental health. However, in accepting this policy argument, the court deprived the defendant of his due process rights by: (1) refusing to recognize a *mens rea* element in the common-law crime of second-degree rape; (2) erroneously construing legislative intent to impose strict liability for second-degree rape; and (3) hyperbolizing the "nexus" between the state's compelling interest in protecting children from sexual exploitation and the means by which that interest is furthered.

1. The Case.—In 1997, a police officer on night patrol discovered Timothy Owens and Ariel Johnson in the rear seat of a parked car.[7] Upon the officer's request for identification, Owens produced a Maryland driver's license that confirmed his name and that he was eighteen years old.[8] Johnson had no identification, but she stated that she was sixteen years old.[9] The officer phoned her residence and discovered that Ariel Johnson was actually thirteen years old.[10] Evidence suggested that the defendant and Johnson recently had engaged in sexual intercourse.[11]

The prosecutor for Baltimore County charged Owens with second-degree rape in violation of Article 27, section 463(a) of the Maryland Code, which holds that "[a] person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person . . . [w]ho is under 14 years of age and the person performing the act is at least four years older than the victim."[12] Owens waived his right to a jury trial and elected to proceed on a not-guilty statement of facts, which the State's Attorney read into the record.[13] Defense counsel asked the court to recognize a "reasonable mistake of age defense," and moved for an acquittal.[14] Defense counsel also moved to dismiss, arguing that the statute violated Owens's due process rights under the Fourteenth Amendment and under Article 24 of the Maryland Decla-

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6. *Id.* at 685, 724 A.2d at 54.
7. *Id.* at 667, 724 A.2d at 45.
8. Record Extract at E14, *Owens* (No. 129).
9. *Id.*
10. *Id.* at E14-15.
11. *Id.* at E15. When Ariel Johnson was asked to step out of the car, a freshly used latex condom fell on the ground beside the vehicle. *Id.*
12. MD. ANN. CODE art. 27, § 463(a)(3) (1996); *see Owens*, 352 Md. at 667, 724 A.2d at 45.
13. *Owens*, 352 Md. at 667, 724 A.2d at 45; Record Extract at E5, E13-15.
14. Record Extract at E15-16.

ration of Rights.[15] In particular, the defendant argued that the statute was fundamentally unfair because it created an irrebuttable presumption that relieved the State of its burden of proving the *mens rea* element of second-degree rape.[16] The trial judge denied the defendant's motion to dismiss, finding that mistake of age could only be considered as a mitigating factor upon sentencing.[17] The court also denied the defendant's motion for acquittal and found the defendant guilty of second-degree rape.[18]

Owens was sentenced to eighteen months of imprisonment, "with all but time served (12 days) suspended, and 18 months of probation."[19] In addition to the usual conditions of probation, Owens also was ordered to register as a child sex offender, to submit to DNA testing, and to have no further contact with the victim.[20] Owens filed a timely appeal to the Court of Special Appeals, but, before the lower court's review, the Court of Appeals granted certiorari to determine whether the legislature had violated the Fourteenth Amendment and the Maryland Declaration of Rights by denying the defendant a mistake-of-age defense.[21]

2. *Legal Background.*—The Fourteenth Amendment provides, *inter alia*, that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."[22] The Maryland Declaration of Rights, Article 24, states that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."[23] The Court of Appeals of Maryland has held that the Fourteenth Amendment's "due process of law" and the Maryland Declaration of Rights' "Law of the land" are equivalent phrases,[24] and that "[a] basic requirement of fairness is that the defendant be given notice of and an *adequate opportunity to defend against the claim on which the judgment is based.*"[25] Despite these

15. *Owens*, 352 Md. at 667, 724 A.2d at 45.
16. Record Extract at E22.
17. *Owens*, 352 Md. at 667-68, 724 A.2d at 45.
18. *Id.*
19. *Id.* at 668, 724 A.2d at 45.
20. *Owens*, 352 Md. at 668, 724 A.2d at 45; Record Extract at E32.
21. *Owens*, 352 Md. at 668-69, 724 A.2d at 45-46.
22. U.S. CONST. amend. XIV, § 1.
23. MD. CONST. DECL. OF RTS. art. 24.
24. *In re* Easton, 214 Md. 176, 187-88, 133 A.2d 441, 447-48 (1957).
25. Travelers Indem. Co. v. Nationwide Constr. Corp., 244 Md. 401, 406, 224 A.2d 285, 288 (1966) (emphasis added) (citing Reynolds v. Stockton, 140 U.S. 254 (1891); RESTATE-

due process requirements, in *Garnett v. State*,[26] the Court of Appeals recently declined to include a *mens rea* element in Maryland's statutory rape law, stating that the legislature had considered and rejected a mistake-of-age defense for statutory rape.[27]

This Section begins by discussing the common-law origins and purposes of statutory rape laws. Next, it examines the rise of strict liability for statutory rape and considers the mistake-of-age defense and the various state court decisions that allow or disallow it. Finally, it explores the constitutional limits of strict liability in criminal proceedings, as set forth by the United States Supreme Court.[28]

a. The History and Purpose of Statutory Rape Laws.—Currently, all states have statutes prohibiting sexual intercourse with underage persons.[29] In a recent survey of twenty-one states, the American Bar Association identified several motivations for statutory rape legislation.[30] These motivations included the protection of minors from sexual intercourse and exploitation, the prevention or reduction of teenage pregnancies, the reduction of the number of teenage mothers on welfare, and the promotion of responsibility and accountability in sexuality and parenting.[31] States also enact statutory rape laws to protect against "physical harm, including the risk of venereal diseases, especially the HIV virus, trauma, and even permanent damage to a child's organs."[32]

Although statutory rape is a recent focus of legislative interest, the proscription against sexual conduct with minors originates from English common law. Under the 1275 Statute of Westminster I, con-

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MENT OF JUDGMENTS § 8(c) (1942)); *see also* Gray v. Netherland, 518 U.S. 152, 171 (1996) (Ginsburg, J., dissenting) (stating that the opportunity to defend is a fundamental right that is protected under the United States Constitution).

26. 332 Md. 571, 632 A.2d 797 (1993).

27. *Id.* at 584-87, 632 A.2d at 804-05.

28. Although Supreme Court decisions vary considerably on the constitutionality of strict liability in the criminal context, the Court is most likely to impose a *mens rea* element and allow a mistake-of-age defense if: (1) the statute outlines a common-law offense versus a public welfare offense, *see* United States v. X-Citement Video, Inc., 513 U.S. 64, 71-72 (1994); (2) the conduct of the accused is "wholly passive," Lambert v. California, 355 U.S. 225, 228 (1957); or (3) the individual's fundamental rights outweigh governmental interests, *cf.* United States v. Balint, 58 U.S. 250, 254 (1922) (interpreting legislative intent to eliminate *mens rea* and concluding that Congress weighed the possible injustice of penalizing an innocent party against the government's interest in protecting the public from harm).

29. *See* NOY S. DAVIS & JENNIFER TWOMBLY, U.S. DEP'T OF JUSTICE, STATE LEGISLATORS' HANDBOOK FOR STATUTORY RAPE ISSUES 1 (2000).

30. *Id.* at 6.

31. *Id.*

32. *Owens*, 352 Md. at 682, 724 A.2d at 52.

sensual or forcible intercourse with a female under the age of valid consent was considered a species of rape and was classified as a misdemeanor.[33] In 1285, the Statute of Westminster II made forcible rape a felony, but remained silent as to the nonforcible rape of a child.[34]

In 1571, a defendant was tried at the Queen's Bench for raping a seven-year-old girl.[35] The court held that no offense was committed, because "'the court doubted of rape in so tender a child.'"[36] The court stated, however, that the result would have been different had the child been nine years of age or older, presumably because girls over the age of nine were capable of procreation.[37] As a direct result of this case, and to clarify the issue of sexual intercourse with children, the 1576 Statute of Elizabeth criminalized "'the abominable wickedness of carnally knowing or abusing any woman child under the age of ten years.'"[38] The statute did not, however, impose strict liability.[39]

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33. Statute of Westminster I, 1275, 3 Edw., c. 13 (Eng.); *see* Vicki J. Bejma, Note, *Protective Cruelty:* State v. Yanez *and Strict Liability as to Age in Statutory Rape*, 5 ROGER WILLIAMS U. L. REV. 499, 512 (2000) (discussing the origins of statutory rape). Sir Edward Coke interpreted the age of valid consent to be twelve years old. Bejma, *supra*, at 512.

34. Statute of Westminster II, 1285, 13 Edw., c. 34 (Eng.); *see* Bejma, *supra* note 33, at 515 n.109 (discussing the Statute of Westminster II). Westminster II made forcible intercourse with an adult woman a capital offense, but remained silent as to nonforcible intercourse with a child. Bejma, *supra* note 33, at 515 n.109. Therefore, reading Westminster I and Westminster II together, nonconsensual intercourse with a female over the age of twelve was a felony punishable by death under Westminster II. Intercourse with a girl under the age of twelve, regardless of consent, remained a misdemeanor under Westminster I. *Id.*

35. *See* Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 9 (1997) (discussing R. v. Dyckson (Q.B. 1571)).

36. *Id.* (quoting 1 REPORTS FROM THE LOST NOTEBOOKS OF SIR JAMES DYER 65 (J.H. Baker ed., 1994)).

37. *Id.*

38. Bejma, *supra* note 33, at 512 (quoting Statute of Elizabeth, 18 Eliza. ch. 7 (1576)).

39. *Id.* at 513. Despite early legislative interest in protecting children from sexual exploitation, the concept of strict liability was not infused into the English criminal law. English common law required both an illegal act and *mens rea*, or guilty intent, for all common-law crimes, and the courts accepted a reasonable mistake-of-fact defense to criminal conduct. *Id.*; *see also* 1 M. HALE, 1 HISTORIA PLACITORUM CORONAE 38 (1847) ("As to criminal proceedings . . . it is the will and intention, that regularly is required, as well as the act and event, to make the offence capital."). For instance, in *Levett's Case*, the court exonerated a defendant who killed another person based on the reasonably mistaken belief that the victim was a burglar, even though the victim was actually engaged in innocent conduct and had a right to be on the property. *See* Levett's Case, *reported in* Cook's Case, 79 Eng. Rep. 1063, 1064 (K.B. 1640) (holding that "it was not murder, but homicide only" when Levett mortally wounded a house servant with his sword, mistakenly believing her to be a thief).

From the Statute of Elizabeth in 1576 until the late nineteenth century, ten years remained the statutory age of consent.[40] However, in 1885, interest in statutory rape legislation surfaced among the American states, and anti-rape activists urged legislators to raise the age of consent.[41] Commentators have suggested that this movement was aimed at liberating women from sexual exploitation, protecting children against sexual abuse, and establishing Victorian moral standards to protect "pure" womanhood.[42] As a result of these interests, many states raised their ages of sexual consent.[43] In 1889, the District of Columbia raised its statutory age to sixteen years, and throughout the 1880s and 1890s, other states and territorial legislatures raised their age-of-consent standards,[44] setting the stage for the mistake-of-age defense to statutory rape.[45]

b. Mens Rea and the Mistake-of-Age Defense for Statutory Rape and Other Strict Liability Crimes.—The two essential elements of most crimes—forbidden conduct and a culpable mental state—are deeply entrenched in the common law.[46] In *Morissette v. United States*,[47] the United States Supreme Court emphasized that

> [a] relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of de-

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40. Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 2 (1997).

41. *Id.* at 2-3.

42. *See* Bejma, *supra* note 33, at 513-14 (arguing that age-of-consent reform was initiated by the Woman's Christian Temperance Union and its allies to protect girls and women from laws and cultural values that threatened their well-being); Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 25-27 (1994) (arguing that the preclusion of a mistake-of-age defense to statutory rape, while allowing a defense based on the promiscuity of the victim, revealed that statutory rape laws were designed to protect "pure" girls).

43. Larson, *supra* note 40, at 2-3.

44. *Id.*

45. *See* Bejma, *supra* note 33, at 514 (suggesting that raising the age-of-consent increases the likelihood that one will mistakenly believe that their partner is above the age of consent because of mature appearance).

46. *See* Morissette v. United States, 342 U.S. 246, 251-52 (1952) (describing the "evil-meaning mind" and the "evil-doing hand" elements of a crime as deeply rooted in American law); *see also* Garnett v. State, 332 Md. 571, 595, 632 A.2d 797, 809 (1993) (Bell, J., dissenting) (discussing the required elements of criminal conduct (citing Dawkins v. State, 313 Md. 638, 643, 547 A.2d 1041, 1043 (1988))).

47. 342 U.S. 246 (1952).

> terrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.[48]

Thus, the Court believed that punishing evil-minded defendants would effectively discourage future criminal behavior, whereas punishing unintentional behavior would serve no clear public purpose.[49] Despite the well-established criminal requirement of a guilty mind, many state legislatures eliminated the *mens rea* element of statutory rape under various legal and ethical theories.[50]

(1) Early Application of Strict Liability in Statutory Rape Cases.— Strict liability for engaging in unlawful conduct with a female under the age of consent was first imposed in the 1875 English case of *Regina v. Prince*.[51] In *Prince*, the defendant was convicted of abducting a sixteen-year-old girl without her father's consent.[52] The victim appeared older than sixteen and had told the defendant that she was eighteen.[53] The abduction statute was silent on the element of *mens rea*, but the Court for Consideration of Crown Cases Reserved interpreted Parliament's silence as intentional, indicating the imposition of strict liability and a deliberate denial of the mistake-of-age defense.[54]

Although American courts applied *Prince* to statutory rape as well, Parliament only had intended strict liability as to age for abduction.[55]

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48. *Id.* at 250-51.

49. *See id.*

50. *See Garnett*, 332 Md. at 601-05, 632 A.2d at 812-14 (Bell, J., dissenting) (describing theories for eliminating *mens rea*, including the "lesser legal wrong" and the "moral wrong" theories). The lesser legal wrong theory states that a person may be guilty of statutory rape, despite a lack of *mens rea*, if he intended to engage in some other legal or moral wrong, such as fornication. *Id.* at 601, 632 A.2d at 812. Alternatively, if nonmarital sexual intercourse is not a criminal act, the moral wrong theory allows the substitution of *mens rea* when a person intends to commit immoral acts, or *malum in se* crimes, such as "indecent acts committed upon underage children, and conduct contributing to the delinquency of a minor." *Id.* at 603 n.12, 632 A.2d at 813 n.12.

51. 2 L.R.-C.C.R. 154 (1875).

52. *Id.* at 154-55.

53. *Id.*

54. *Id.* at 171.

55. *See* Bejma, *supra* note 33, at 517-18 ("The issue in *Prince* was mistake of age as to abduction; there would be no English case rejecting reasonable mistake of age as to statutory rape."). For early American statutory rape cases following *Prince*, see *Brown v. State*, 74 A. 836, 841 (Del. 1909) (finding that statements of age made by the statutory rape victim and the defendant's reasonable belief about her age were "irrelevant and immaterial"); *State v. Basket*, 19 S.W. 1097 (Mo. 1892) (refusing a reasonable mistake-of-age defense for statutory rape of a twelve-year-old girl); *Lawrence v. Commonwealth*, 71 Va. 845, 854-55 (1878) (finding that the lower court did not err by refusing to give jury instructions that the defendant could not be found guilty of statutory rape based on a reasonable mistake-of-age defense); *see also* Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 105-08 (1965) (arguing that American statutory rape laws,

Indeed, in the ten years that followed *Prince*, there were no English cases that rejected a reasonable mistake-of-age defense to statutory rape, and English statutes were amended in 1885 to allow a reasonable mistake-of-age defense for the crime of "'defilement of a girl between thirteen and eighteen.'"[56]

(2) California Courts: The First Appearance in the United States of the Mistake-of-Age Defense to Statutory Rape.—Notwithstanding English statutory modifications after *Prince*, American courts continued to deny the mistake-of-age defense and imposed strict liability for statutory rape until 1964, when the California Supreme Court reversed course in *People v. Hernandez*.[57] In *Hernandez*, the eighteen-year-old defendant appealed a statutory rape conviction for engaging in sexual intercourse with a seventeen-year-old female, arguing a reasonable mistake-of-age defense.[58] The California Penal Code was silent on the element of *mens rea*.[59] Relying on common-law analysis, the court reasoned that an honest and reasonable belief in a set of circumstances "has always been held to be a good defense," and that there was no reason to exclude the defense for statutory offenses.[60] Thus, the *Hernandez* court held "that in the absence of a legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking."[61] However, the court clarified that it was not abandoning the sound public policy of protecting children from sexual exploitation, and it reaffirmed that a claimed good faith belief that an infant female was above the age of consent should be condemned as intolerable.[62]

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which are derived from English common law, erroneously deny the mistake-of-age defense for statutory rape). In 1861, Parliament passed the Offenses Against the Person Act, 24 & 25 Vict., c. 100, § 55 (Eng.), which imposed strict punishments on those found guilty of *abducting* heiresses. Deborah Gorham, *The "Maiden Tribute of Modern Babylon" Re-Examined: Child Prostitution and the Idea of Childhood in Late-Victorian England*, 21 VICTORIAN STUD. 353, 362-63 (1978). Lawmakers feared that their daughters would be stolen away for their fortunes. *Id.* This fact suggests that the laws were designed to enforce the authority of parents or guardians instead of protecting the rights of underage girls. *Id.*

56. *See* Bejma, *supra* note 33, at 517 (quoting Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, §§ 5(1)-(2)).

57. 393 P.2d 673 (Cal. 1964).

58. *Id.* at 674.

59. *Id.* at 673.

60. *Id.* at 677 (internal quotation marks omitted) (quoting *In re* Ahart, 159 P. 160, 161 (Cal. 1916)).

61. *Id.*

62. *Id.*

Since *Hernandez*, at least three appellate courts have adopted the view that reasonable mistake of age is a defense to statutory rape,[63] and the legislatures of seventeen states have passed laws that allow a mistake-of-age defense in some form.[64] Other courts have held the mistake-of-age defense applicable only when based upon age declarations made by the victim.[65]

(3) Garnett and Outmezguine: *Maryland Denies the Mistake-of-Age Defense.*—In *Garnett v. State*, Maryland followed the same course as a majority of other states with respect to the mistake-of-age defense. The Court of Appeals of Maryland explained that "Maryland's second degree rape statute defines a strict liability offense that does not require the State to prove *mens rea*; it makes no allowance for a mistake-of-age defense."[66]

In *Garnett*, the defendant was a twenty-year-old retarded man with an I.Q. of fifty-two, who had engaged in consensual sexual intercourse with a thirteen-year-old girl.[67] The defendant was charged with second-degree rape under Article 27, section 463(a)(3) of the Maryland Code.[68] The defendant argued and proffered evidence that the girl had told him that she was sixteen years old, and that he had acted reasonably on that belief.[69] The Circuit Court for Montgomery County excluded evidence relating to the defendant's belief about the girl's age and found him guilty, stating that "'[u]nder 463, the only two requirements as relate to this case are that there was vaginal intercourse, [and] that . . . [the victim] was under 14 years of age and that

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63. *See* State v. Guest, 583 P.2d 836, 838-39 (Alaska 1978) (holding that a statutory rape conviction can be defended by showing an honest and reasonable mistake of fact as to the victim's age); People v. Nigri, 42 Cal. Rptr. 679 (Cal. 1965) (ordering a new trial where mistake as to a girl's age was treated as immaterial); Perez v. State, 803 P.2d 249 (N.M. 1990) (allowing a defendant to present a defense that his partner had told him she was seventeen when she was actually fifteen, and holding that there was no compelling public interest for strict liability in a case where a child was between thirteen and sixteen because of the child's "increased maturity and independence").

64. Garnett v. State, 332 Md. 571, 582, 632 A.2d 797, 802 (1993).

65. *See, e.g.*, Lechner v. State, 715 N.E.2d 1285, 1288 (Ind. App. 1999) (holding that if a jury believes declarations were made by the victim that she was over the age of consent, reasonable doubt exists as to the defendant's requisite mental state to constitute a crime); State v. Bennett, 672 P.2d 772, 776 (Wash. App. 1983) (holding that Washington's rape statute only provides a mistake-of-age defense when the victim makes an "explicit assertion" about her age).

66. *Garnett*, 332 Md. at 584-85, 632 A.2d at 803-04.

67. *Id.* at 574, 632 A.2d at 798-99.

68. *Id.*; *see supra* text accompanying note 12 (quoting the applicable provisions of the Maryland statutory rape law).

69. *Garnett*, 332 Md. at 575, 632 A.2d at 799.

. . . [the defendant] was at least four years older than she.'"[70] The defendant appealed and the Court of Appeals granted certiorari to determine whether Maryland's second-degree rape statute allowed for a mistake-of-age defense.[71]

The *Garnett* majority reasoned that section 463(a)(3) was silent as to *mens rea* by legislative design.[72] The court reasoned that because the legislature expressly provided for proof of a culpable mental state in another provision of the same statute, its absence in section 463(a)(3) "indicate[d] that the Legislature aimed to make statutory rape with underage persons a more severe prohibition based on strict criminal liability."[73] The *Garnett* court concluded that section 463(a)(3)'s intentional silence as to *mens rea* meant that the State was not required to prove it.[74] With the elimination of the *mens rea* element, the defendant's mistake-of-age defense was rejected.[75]

In *Outmezguine v. State*,[76] the Court of Appeals took a similar approach to strict liability in its interpretation of Maryland's child pornography statute.[77] In that case, the court imposed strict liability for photographing individuals under eighteen years of age who were en-

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70. *Id.* (alteration in original).

71. *Id.* at 575-76, 632 A.2d at 799.

72. *Id.* at 585, 632 A.2d at 804.

73. *Id.* at 586, 632 A.2d at 804. In addition to the statutory rape provisions set forth in section 463(a)(3), the Maryland second-degree rape statute also includes section 463(a)(1), which prohibits vaginal intercourse "[b]y force or threat of force against the will and without the consent of the other person," and section 463(a)(2), which prohibits vaginal intercourse with a person when "the person performing the act *knows or should reasonably know* the other person is mentally defective, mentally incapacitated, or physically helpless." MD. ANN. CODE art. 27, § 463(a)(1)-(2) (1996) (emphasis added).

74. *Garnett*, 332 Md. at 586, 632 A.2d at 804. *But see id.* at 590, 632 A.2d at 806 (Eldridge, J., dissenting). Judge Eldridge stated:

> Neither the statutory language nor the legislative history of § 463(a)(3), or of the other provisions of the 1976 and 1977 sexual offense statutes, indicate that the General Assembly intended § 463(a)(3) to define a pure strict liability offense where criminal liability is imposed regardless of the defendant's mental state. The penalty provision for a violation of § 463(a)(3), namely making the offense a felony punishable by a maximum of 20 years imprisonment (§ 463(b)), is strong evidence that the General Assembly did not intend to create a pure strict liability offense.

Id.; *see also id.* at 625-26, 632 A.2d at 824 (Bell, J., dissenting) (arguing that due process under the Fourteenth Amendment and the Maryland Declaration of Rights precludes strict criminal liability for statutory rape).

75. *Garnett*, 332 Md. at 588, 632 A.2d at 805.

76. 335 Md. 20, 641 A.2d 870 (1994).

77. MD. ANN. CODE art. 27, § 419A. Section 419A(c) reads: "Every person who photographs, films, . . . or describes a minor engaging in an obscene act or engaging in sexual conduct . . . as defined in § 416A of this article is subject to the penalty provided in subsection (f) of this section." *Id.*

gaged in obscene acts or sexual conduct.[78] In *Outmezguine*, the defendant appealed a conviction under section 419A(c) of the Maryland Code, arguing a defense based on a reasonable belief that the subject was over the age of eighteen.[79] Employing a "legislative design" analysis similar to the analysis the court had used in *Garnett*, the court in *Outmezguine* held that strict liability applied because the language of section 419A(b) and (d) contained knowledge requirements, while subsection (c) remained silent.[80] However, the *Outmezguine* majority did not address the issue of reasonable mistake of age, holding that the issue was not properly raised at trial and was therefore waived.[81]

In sum, *Hernandez* opened the door for allowing the mistake-of-age defense to statutory rape. While several courts adopted the ruling of *Hernandez*, most states, including Maryland, adhere to the majority rule that statutory rape is a strict liability offense, which does not require proof of *mens rea*. Although construing the statutes in *Garnett* and *Outmezguine* to impose strict liability raised due process concerns under the Fourteenth Amendment, the constitutionality of such statutes was not addressed in either case.

c. The Constitutional Limits of Strict Liability in Criminal Law.— Although *Garnett* declined to address the Fourteenth Amendment issue raised by Maryland's statutory rape statute, many courts and commentators have attempted to define constitutional limits on strict liability.[82] The Supreme Court has expressly refused to set forth limits on strict liability in general, which has led to inconsistent rulings among state courts.[83] Indeed, one commentator, exemplifying the inextricable sentiment surrounding the Supreme Court's strict liability jurisprudence, states that "'[*m*]*ens rea* is an important requirement, but it is not a constitutional requirement, except sometimes.'"[84]

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78. *Outmezguine*, 335 Md. at 43, 641 A.2d at 881.

79. *Id.* at 28-29, 641 A.2d at 874-75.

80. *Id.* at 43-44, 641 A.2d at 881-82.

81. *Id.* at 52, 641 A.2d at 886.

82. *See, e.g.*, Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 834 (1999) (asserting that "[a]ccording to the principle of constitutional innocence, strict liability is constitutional when, but only when, the intentional conduct covered by the statute could be made criminal by the legislature").

83. *Id.* at 832.

84. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107-10. In light of such criticism, the Model Penal Code and the Uniform Code of Military Justice require culpability for all crimes in the Code, including statutory rape. Michaels, *supra* note 82, at 832 (citing MODEL PENAL CODE 2.05 cmt. at 282 (1985)); *see also* MODEL PENAL CODE § 213.6 (recognizing the reasonable mistake-of-age defense in statutory rape offenses); Uniform Code of Military Justice, 10 U.S.C.S. § 920 (recognizing a mistake-of-age defense if "the accused reasonably believed that [the person with whom the accused engages in

(1) Early Criminal Cases Involving Strict Liability.—United States v. Balint[85] was the first United States Supreme Court case to address strict liability in a criminal proceeding for the unlawful sale of narcotic drugs.[86] The Narcotic Act of December 17, 1914, required the sales of certain drugs, including those sold by the defendants, to be properly recorded and maintained for two years.[87] The statute did not contain any express language requiring knowledge as to the nature of the drugs as an element of the offense.[88] The defendants argued that the statute violated their due process rights because they had been punished without knowledge that the drugs they had sold were restricted.[89] The Supreme Court held that "Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided."[90] In other words, Congress balanced the government's interest in protecting the public's health against the interests of innocent-minded sellers, and determined that the risk of inadvertently selling narcotic drugs fell exclusively on the seller.[91] Thus, the Court used statutory construction and balancing of interests to interpret legislative intent and found no due process violation.

Twenty-one years after *Balint*, the Supreme Court reexamined strict liability in the criminal context in *United States v. Dotterweich*.[92] In *Dotterweich*, a corporate officer had been convicted of adulterating and misbranding drugs and shipping them via interstate commerce, in violation of the Federal Food, Drug, and Cosmetic Act.[93] The officer never knew that the adulterated drugs had been introduced into interstate commerce, and there was no evidence that showed personal guilt on his part.[94] The Court granted certiorari to consider whether Congress had intended the statute to cover only the corporation and

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consensual sexual intercourse] had at the time of the alleged offense attained the age of sixteen years").

85. 58 U.S. 250 (1922).

86. *Id.* at 254.

87. *Id.* at 251.

88. *Id.* at 253 n.1

89. *Id.* at 251.

90. *Id.* at 254.

91. *See id.*

92. 320 U.S. 277 (1943).

93. *Id.* at 278; *see* 21 U.S.C. § 331(a) (1938) (prohibiting "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded").

94. *Dotterweich*, 320 U.S. at 285-86 (Murphy, J., dissenting).

not its employees.[95] The majority found that Congress had intended that corporate employees could be liable, reasoning that penalties imposed by strict liability legislation were an effective means of regulation.[96] Relying on *Balint*, the Court affirmed its utilitarian approach to statutory interpretation, holding that "[i]n the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[97] Therefore, to achieve the greatest good for the greatest number of people, the Court affirmed that individuals who engage in activities that are potentially dangerous to the public would not be allowed to disclaim responsibility because they were unaware of the danger.[98]

In a dissenting opinion, Justice Murphy wrote: "[I]n the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge."[99] Thus, the dissent argued that the legislative power to impose strict criminal liability and restrain liberties should not be based on variable statutory interpretation by the judiciary.[100]

Two years later, the Supreme Court decided *Williams v. North Carolina*,[101] upholding the broad scope of strict liability in a criminal proceeding for bigamous cohabitation.[102] In *Williams*, the defendants, each already married to another spouse in North Carolina, wanted to marry each other.[103] They drove to Nevada to obtain divorces, got married, and then returned to North Carolina as husband and wife.[104] The Supreme Court of North Carolina found that the divorce decrees were invalid because of improper jurisdiction; as a result, the defendants were convicted under North Carolina's bigamy statute.[105] The United States Supreme Court granted certiorari, and held that, despite the defendants' lack of knowledge that their divorces were invalid, their due process rights had not been violated, because they had assumed the risk of engaging in bigamous cohabitation.[106]

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95. *Dotterweich*, 320 U.S. at 279.
96. *Id.* at 280-81.
97. *Id.* at 281.
98. *Id.*
99. *Id.* at 286 (Murphy, J., dissenting).
100. *See id.*
101. 325 U.S. 226 (1945).
102. *See id.* at 238.
103. *Id.* at 235.
104. *Id.*
105. *Id.* at 227 & n.1 (citing N.C. GEN. STAT. § 14-183 (1943)).
106. *Id.* at 238.

(2) The Tide Reverses.—In 1952, the Supreme Court deviated sharply from *Balint*, *Dotterweich*, and *Williams*. In *Morissette v. United States*,[107] the defendant had been charged with removing spent bomb casings from government property without authorization.[108] At trial, he argued that his intentions had been innocent, and that he had thought that the casings had been abandoned and were of no value to the government.[109] Notwithstanding his defense, the defendant was convicted for "unlawfully, wilfully, and knowingly steal[ing] and convert[ing]" government property.[110] The Supreme Court reversed Morissette's conviction, finding that to deny the petitioner a defense that could negate a culpable state of mind "would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime."[111] Although *Morissette* did not directly address the constitutional limits of strict liability, the Court used dicta that supported strict liability for public welfare offenses, but disfavored eliminating the *mens rea* element for common-law crimes.[112] Thus, *Morissette* indirectly suggested that the constitutional limit should be drawn between enacted regulatory offenses and traditional common-law crimes such as murder, rape, or theft.[113]

In 1957, the Supreme Court stirred up controversy over the future of strict liability when it handed down its decision in *Lambert v. California*.[114] In *Lambert*, the Court found that actual knowledge of a duty to register was necessary before a conviction could stand under a felon registration ordinance.[115] Lambert was charged with violating a section of the Los Angeles Municipal Code that required convicted felons to register with the police within five days of entering the city.[116] Lambert had been convicted of forgery, but failed to register under the Municipal Code while living in Los Angeles for over seven

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107. 342 U.S. 246 (1952).

108. *Id.* at 248.

109. *Id.*

110. *Id.*

111. *Id.* at 275.

112. *See id.* at 262 (explaining that *mens rea* had not been eliminated from common-law offenses as it had been for many public welfare offenses).

113. *See* Michaels, *supra* note 82, at 852 ("[T]he Court's clear disapproval of the application of strict liability in these cases suggests the constitutional limit on the strictness of liability: there must be culpability regarding elements that the legislature has the power to punish independently.").

114. 355 U.S. 225 (1957).

115. *Id.* at 229-30.

116. *Id.* at 226 (citing L.A., CAL., MUN. CODE § 52.39 (1936)).

years.[117] The defendant claimed that she had been unaware of her duty to register and objected to the charge, asserting that the applicable section of the Municipal Code was unconstitutional.[118] The Supreme Court held that the due process requirement of notice is "appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."[119] The Court went further, acknowledging that legislators have wide latitude in regulating the elements of criminal offenses, but that they may not eliminate the *mens rea* element for passive criminal conduct.[120]

(3) The Road After Lambert*: Mixed Holdings.*—Despite the Supreme Court's holding in *Lambert*, it diverged again in *United States v. Freed*,[121] holding that *mens rea* was unnecessary to convict possessors of unregistered explosives.[122] The *Freed* court used a balancing test to determine whether *mens rea* was a necessary element of a violation of the National Firearms Act,[123] which provided, *inter alia*, that it was unlawful to receive or possess an unregistered firearm.[124] In *Freed*, the defendants possessed unregistered hand grenades, but were unaware of the illegality of such possession.[125] The Court held that the Act required no specific intent or knowledge that the hand grenades were unregistered.[126] In so finding, the Court stated that regulating dangerous offensive weapons was in the interest of public safety.[127] Citing *Balint*, the Court concluded that the possibility of penalizing parties who have no criminal intent was outweighed by the danger of hand grenade possession.[128]

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117. *Id.*
118. *Id.* at 226-27.
119. *Id.* at 228.
120. *Id.* The *Lambert* Court stated:

> There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.

Id. (citations omitted).
121. 401 U.S. 601 (1971).
122. *Id.* at 609.
123. *Id.* at 609-10.
124. *See* 26 U.S.C. § 5812(b) (1964) ("The transferee of a firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required . . . .").
125. *Freed*, 401 U.S. at 607.
126. *Id.*
127. *Id.* at 609.
128. *Id.*

In *United States v. Feola*,[129] the Supreme Court went one step further and found that, in addition to regulatory offenses, common-law crimes could also be subject to strict liability.[130] In *Feola*, the defendant and three others had been convicted of assaulting undercover federal narcotics agents and of conspiring to commit the offense.[131] The Supreme Court granted certiorari to determine whether the crimes of assaulting and conspiring to assault a federal officer required knowledge of the victim's identity.[132] The Court held that "knowledge of the facts giving rise to federal jurisdiction [was] not necessary for conviction of a substantive offense embodying a *mens rea* requirement."[133] Thus, the *Feola* Court demonstrated that both regulatory offenses and common-law crimes could be subject to strict liability.

Twenty-four years after *Freed*, the Supreme Court came full circle in *Staples v. United States*.[134] *Staples* involved another provision of the National Firearms Act,[135] which required that automatic weapons be registered with the Federal Government and which provided a sentence of up to ten years' imprisonment for violation of the Act.[136] In *Staples*, the defendant had been convicted under the Act for possessing an automatic rifle, but he denied any knowledge of its automatic capabilities.[137] The Supreme Court held that the Government was required to prove that the defendant knew of the automatic features of the rifle, and that congressional silence as to *mens rea* did not negate the requirement.[138] Specifically, the Court stated: "[W]e think that the penalty attached to § 5861(d) suggests that Congress did not intend to eliminate a *mens rea* requirement for violation of the section."[139] The *Staples* majority distinguished *Freed* on the basis that Freed knew that a hand grenade was a particularly dangerous weapon, whereas Staples was ignorant of the automatic capabilities of his rifle.[140]

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129. 420 U.S. 671 (1975).
130. *Id.* at 696.
131. *Id.* at 673.
132. *Id.* at 672.
133. *Id.* at 696.
134. 511 U.S. 600 (1994).
135. 26 U.S.C. §§ 5801-5872 (1994).
136. *Staples*, 511 U.S. at 602-03 (describing 26 U.S.C. § 5861(d)).
137. *Id.* at 603.
138. *Id.* at 619.
139. *Id.*
140. *Id.* at 611-12.

In the same year, the Supreme Court followed the holding of *Staples* in *United States v. X-Citement Video*.[141] *X-Citement Video* involved the Protection of Children Against Sexual Exploitation Act, which provides criminal penalties for "knowingly" shipping or receiving visual depictions of minors engaged in sexual conduct.[142] In *X-Citement Video*, the defendant argued that the Act was unconstitutional on its face because it lacked a scienter requirement as to the age of the depicted child.[143] The defendant was convicted in the United States District Court for the Central District of California, but the United States Court of Appeals for the Ninth Circuit reversed, accepting the defendant's constitutional argument.[144] The Supreme Court reversed, holding that "a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress."[145] Thus, the Court recognized that potential constitutional obstacles may exist in statutes that eliminate *mens rea*, but when it was possible for the Court to interpret the statute in a way that avoided such obstacles, it would do so.[146] Since the child pornography statute was not a "public welfare offense," but "more akin to the common-law offenses . . . that presume a scienter requirement in the absence of express contrary intent," the Court read a scienter element into the statute where a grammatical reading of the statute would have excluded such a requirement, upholding its constitutionality.[147]

(4) The States' Response to Supreme Court Guidelines.—Although the Supreme Court "has never articulated a general constitutional doctrine of *mens rea*,"[148] it is evident from case law that the Court is more likely to impose a scienter element in strict liability statutes when the statute resembles a common-law offense versus a public

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141. 513 U.S. 64 (1994).

142. *Id.* at 67-68 (quoting 18 U.S.C. § 2252(a) (1988)).

143. *Id.* at 66-67.

144. *Id.* at 67; United States v. X-Citement Video, Inc., 982 F.2d 1285, 1287 (9th Cir. 1992) (holding that a lack of a scienter requirement was "fatally defective" to the Act).

145. *X-Citement Video*, 513 U.S. at 78 (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

146. *Id.*

147. *Id.* at 71-72.

148. Powell v. Texas, 392 U.S. 514, 535 (1968). "[A] general constitutional doctrine of *mens rea*" refers to a clear Supreme Court doctrine for measuring the constitutionality of eliminating the *mens rea* requirement from criminal proceedings involving strict liability. *Id.*

welfare offense,[149] when the conduct of the accused is "wholly passive,"[150] or when a balancing test favors the protection of individuals who lack criminal intent over the public good that results from regulation.[151]

Despite these relative guidelines from the Supreme Court, the majority of states have rejected constitutional challenges to statutory rape laws that deny a mistake-of-age defense.[152] However, at least one state—Alaska—has held that a mistake-of-age defense to statutory rape is mandated by due process.[153] In *State v. Guest*,[154] the Alaska Supreme Court ruled that statutory rape is legally groundless unless a reasonable mistake-of-age defense is allowed.[155] The court reasoned:

> Although [the statute] is silent as to any requirement of intent . . . [t]he requirement of criminal intent is then commonly inferred. In fact, in such cases, where the particular statute is not a public welfare type of offense, either a requirement of criminal intent must be read into the statute or it must be found unconstitutional.[156]

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149. *See X-Citement Video*, 513 U.S. at 71-72.

150. *See* United States v. Lambert, 355 U.S. 225, 228 (1957) (distinguishing between active conduct, which could alert a defendant to the consequences of his action, and failing to act, for which a conviction cannot stand unless the defendant knew of the requirement to act).

151. *Cf.* United States v. Balint, 258 U.S. 250, 254 (1922) (discussing Congress's intent to eliminate *mens rea* if the possible injustice of penalizing an innocent party is outweighed by the public interest).

152. *See Owens*, 352 Md. at 675 n.5, 724 A.2d at 49 n.5 (citing United States v. Ransom, 942 F.2d 775, 776 (10th Cir. 1991) (denying a constitutional attack on a statutory rape law and stating that the legislature had wide latitude in enacting strict liability statutes); United States v. Brooks, 841 F.2d 268, 269 (9th Cir. 1988) (holding that statutory rape is a recognized judicial exception to the mistake-of-fact defense); Nelson v. Moriarty, 484 F.2d 1034, 1035 (1st Cir. 1973) (noting that the Supreme Court has never held that a reasonable mistake-of-age defense is a constitutional defense to statutory rape); State v. Tague, 310 N.W.2d 209, 212 (Iowa 1981) (holding that the defendant bore the full risk of his conduct by engaging in sexual intercourse with a minor); Commonwealth v. Miller, 432 N.E.2d 463, 466 (Mass. 1982) (holding that strict criminal liability is not necessarily unconstitutional in a case of statutory rape); People v. Cash, 351 N.W.2d 822, 828 (Mich. 1984) (declaring that the mistake-of-age defense to statutory rape is not constitutionally mandated); State v. Stokely, 842 S.W.2d 77, 81 (Mo. 1992) (finding no violation of due process when a statute expressly denies the mistake-of-age defense for statutory rape); State v. Campbell, 473 N.W.2d 420, 424-25 (Neb. 1991) (denying a reasonable mistake-of-age defense for statutory rape); Goodrow v. Perrin, 403 A.2d 864, 868 (N.H. 1979) (finding that a good faith belief in the age of one's sexual partner is not a constitutional defense to statutory rape)).

153. State v. Guest, 583 P.2d 836 (Alaska 1978).

154. *Id.*

155. *Id.* at 838-39.

156. *Id.* at 839 (citations omitted).

Guest, like *Morissette* and *X-Citement Video*, made a distinction between public welfare regulations and the punishment of common-law offenses.[157]

(5) The Regulation-Punishment Distinction in Maryland.—The Court of Appeals of Maryland also recognized the regulation-punishment distinction in *Dawkins v. State*.[158] In *Dawkins*, the defendant was convicted for possession of heroin and of controlled paraphernalia in violation of a subsection of the Maryland Code.[159] The defendant testified, and evidence supported, that the bag containing the heroin was owned by the defendant's girlfriend, and that he had no knowledge of the drugs inside.[160] However, the Court of Special Appeals found that proof of scienter, with respect to possession of the drugs, was not required and thus affirmed the judgment.[161] The Court of Appeals reversed, holding that knowledge was an element of the statutory offense because illegal possession of a controlled substance is "a most serious offense."[162] Furthermore, the *Dawkins* majority suggested that the purpose of penalizing serious offenders is to "punish and deter immoral behavior having serious consequences, rather than merely to regulate conduct."[163]

The Court of Appeals went one step further in *State v. McCallum*,[164] where it held that even driving with a suspended license, which is punishable by imprisonment of one year and fines, is considered more than a public welfare offense, and is entitled to the requirement of scienter.[165] The court reasoned that the defendant would have "no reason to suspect that he was endangering the public by driving if he had no knowledge that his driving privileges were suspended."[166]

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157. *Id.*; *see* Morissette v. United States, 342 U.S. 246, 256 (1952) (explaining with regard to public welfare offenses that "whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity"); United States v. X-Citement Video, 513 U.S. 64, 71-72 (1994) (noting that for common-law offenses, the Court will "presume a scienter requirement in the absence of express contrary intent").

158. 313 Md. 638, 547 A.2d 1041 (1988).

159. *Id.* at 640, 547 A.2d at 1041-42; *see* MD. ANN. CODE art. 27, § 287(a) (1987) ("Except as authorized by this subheading, it is unlawful for any person . . . [t]o possess or administer to another any controlled dangerous substance, unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice.").

160. *Dawkins*, 313 Md. at 640, 547 A.2d at 1042.

161. *Id.* at 641, 547 A.2d at 1042.

162. *Id.* at 651, 547 A.2d at 1047.

163. *Id.*

164. 321 Md. 451, 583 A.2d 250 (1991).

165. *Id.* at 457, 583 A.2d at 253.

166. *Id.*

In sum, both the United States Supreme Court and the Court of Appeals of Maryland have acknowledged that enacted common-law offenses presume a *mens rea* requirement in the absence of express contrary intent, and that attaching harsh penalties, such as imprisonment, requires the Government to prove *mens rea* beyond a reasonable doubt.[167] Although case law on the constitutional issues surrounding *mens rea* are inconsistent, the emergence of precedent, which in effect creates irrebuttable strict liability for common-law offenses, may also create several irrefutable presumptions, which would violate due process under the Fourteenth Amendment and the Maryland Declaration of Rights.

d. Irrebuttable Presumptions.—An irrebuttable presumption is defined as "one in which proof of basic fact renders the existence of the presumed fact conclusive and irrebuttable."[168] In other words, irrebuttable presumptions occur when from one fact a second fact is presumed to exist, and the opponent is precluded from disproving the second fact.[169] For instance, when a legislature enacts a strict liability crime, such as statutory rape, which excludes an element such as the defendant's mental state, it creates an irrebuttable presumption that the defendant's knowledge or intent is irrelevant.[170] As such, irrebuttable presumptions have been held unconstitutional by the Supreme Court in certain circumstances.[171]

For example, in *Vlandis v. Kline*,[172] the Supreme Court struck down a Connecticut statute that created an irrebuttable presumption that a student remained a nonresident for tuition purposes for as long as the student was enrolled at the school.[173] The Court prohibited the government from using a permanent irrebuttable presumption "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination."[174] The Court reasoned that excusing the proponent

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167. *See supra* notes 156-157 & 161-163 and accompanying text (supporting a *mens rea* element for common-law offenses and offenses with strict penalties attached).

168. BLACK'S LAW DICTIONARY 1186 (6th ed. 1990).

169. *See id.*

170. *See* Garnett v. State, 332 Md. 571, 616, 632 A.2d 797, 819 (1993) (Eldridge, J., dissenting) (citing LYNN MCLAIN, MARYLAND PRACTICE, IRREBUTTABLE PRESUMPTIONS AND CONSTITUTIONAL LIMITATIONS IN CRIMINAL CASES § 301.1, at 183 (1987)).

171. *Id.* (citing Vlandis v. Kline, 412 U.S. 441, 446, 453 (1973)).

172. 412 U.S. 441 (1973).

173. *Id.* at 443, 453-54.

174. *Id.* at 452; *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974) (finding that a public school's mandatory maternity leave rule violated due process because the rule presumed that pregnant women were physically unfit for teaching); Stanley

of the presumed fact from the burden of proving it rendered the statute arbitrary and unconstitutional.[175] A second basis for disfavoring irrebuttable presumptions is that they conflict with the presumption of innocence and usurp the fact-finding process of the jury.[176]

Similarly, Maryland has also held that irrebuttable presumptions violate due process. In *Mahoney v. Byers*,[177] the Maryland Racing Commission promulgated a rule that horse trainers would be subject to penalties if saliva, urine, or blood samples taken from their horse on the day of a race revealed drugs, regardless of whether the trainer actually had administered the drug.[178] The Court of Appeals held that "'[*t*]*he fact* that the analysis shows the *presence of a drug* [*was*] *conclusive evidence* either that there was knowledge *of the fact on the part of the trainer* or that he was guilty of carelessness in permitting it to be administered'"[179] was an irrebuttable presumption that was "arbitrary, illegal, capricious and hence unconstitutional."[180]

3. The Court's Reasoning.—In *Owens v. State*, the court held that the defendant's due process rights were not violated when the trial court prevented him from asserting a reasonable mistake-of-age defense to statutory rape.[181] Writing for the majority, Judge Chasanow, joined by Judges Rodowsky, Raker, and Wilner, began with a review of the decision in *Garnett*, which followed the majority rule that a defendant's knowledge about the age of a minor is not an element of statutory rape, thus making it a strict liability offense.[182] In *Owens*, Judge Chasanow focused on four areas for consideration: (1) whether due process uniformly requires that criminal laws contain a *mens rea* element; (2) whether Maryland's statutory rape law satisfied the specific requirements of due process; (3) whether the Maryland General Assembly pursued a legitimate state interest through suitable means in enacting its statutory rape law; and (4) whether the statutory rape law

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v. Illinois, 405 U.S. 645, 649-50 (1972) (holding that a statute that presumed that single fathers were unfit to raise children violated the Fourteenth Amendment's Due Process and Equal Protection Clauses).

175. *See Vlandis*, 412 U.S. at 452.

176. *See* Garnett v. State, 332 Md. 571, 616, 632 A.2d 797, 819 (Eldridge, J., dissenting) (citing Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (arguing that jury instructions that relieve the prosecution of its burden of proof violate a defendant's due process rights because belief in the defendant's argument is a question of fact for the jury to decide)).

177. 187 Md. 81, 48 A.2d 600 (1946).

178. *Id.* at 83-84, 48 A.2d at 602.

179. *Id.* at 86, 48 A.2d at 603.

180. *Id.* at 87, 48 A.2d at 603.

181. *See Owens*, 352 Md. 663, 690, 724 A.2d 43, 56 (1999).

182. *Id.* at 668, 724 A.2d at 45.

created an irrebuttable presumption that would render it unconstitutional.[183]

First, the majority considered whether due process mandates a *mens rea* element in criminal statutes.[184] The court acknowledged the similarity between the due process provisions of the United States Constitution and the Maryland Declaration of Rights,[185] and conceded that pertinent Supreme Court decisions were "practically direct authority" for interpreting the Due Process Clause of the Maryland Declaration of Rights.[186] Although the court cited *Morissette*, *Lambert*, *Staples*, and *X-Citement Video* as direct support for imposing a *mens rea* element in criminal statutes where none was expressly provided, the majority also noted that the Supreme Court had never articulated an absolute constitutional doctrine of scienter.[187] Rather, the court asserted that individual states may, within constitutional boundaries, enact criminal statutes that contain no *mens rea* element.[188]

Most cases that uphold strict liability statutes involve public welfare offenses that aim to regulate particular conduct.[189] However, the *Owens* majority reasoned that the Supreme Court never limited strict liability to regulatory offenses.[190] The court cited *Feola*, in which a defendant was found liable for conspiracy to assault a federal officer despite his lack of knowledge of the victim's identity.[191] Thus, the *Owens* court demonstrated that, in addition to regulatory offenses, common-law crimes could also be subject to strict liability.[192] Furthermore, the court recognized that penalties attached to common-law crimes can be used to determine whether *mens rea* is a necessary requirement of a statute.[193] However, the majority discounted punishment considerations in *Owens* because statutory penalties have traditionally been used "for purposes of statutory construction and not for purposes of constitutional analysis."[194]

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183. *Id.* at 666-90, 724 A.2d at 44-56.

184. *Id.* at 668-79, 724 A.2d at 44-51.

185. *Id.* at 669 n.3, 724 A.2d at 46 n.3; *see supra* text accompanying notes 22 & 23 (providing the applicable text of the Fourteenth Amendment and the Maryland Declaration of Rights).

186. *Owens*, 352 Md. at 669 n.3, 724 A.2d at 46 n.3.

187. *Id.* at 672, 724 A.2d at 47.

188. *Id.* (citing Smith v. California, 361 U.S. 147, 150 (1959)).

189. *See supra* notes 112-113 and accompanying text.

190. *Owens*, 352 Md. at 672, 724 A.2d at 47.

191. *Id.* (citing United States v. Feola, 420 U.S. 671, 696 (1975)).

192. *Id.*

193. *Id.* at 678, 724 A.2d at 50.

194. *Id.*

After neutralizing the regulatory punishment distinction, the *Owens* majority concluded that the common-law offense of second-degree rape, which included a twenty-year prison sentence and a requirement to register as a sex offender, was insufficient to trigger a *mens rea* requirement under due process.[195] In addition, the court noted that only Alaska allows a reasonable mistake-of-age defense to statutory rape based on due process rights.[196] In analyzing *Guest*, the court declined to part from the majority rule upholding statutory rape as a strict liability crime, noting that the Alaska Supreme Court had "interpreted its state constitution more expansively than the federal constitution."[197] Although the defendant had argued that, under the common law, *mens rea* is favored for criminal liability, the court declined to analyze whether, at common law, mistake of age was permissible as a defense to statutory rape.[198] Instead, the court concluded that, regardless of the defense at common law, the Maryland statutes do not include a mistake-of-age defense.[199]

Next, the court considered whether Maryland's statutory rape law met the specific requirements of due process.[200] Distinguishing *Lambert*, the court held that the statute provides constitutionally sufficient notice because "sexual intercourse proscribed by § 463(a)(3) can hardly be characterized as passive; it involves conscious activity which gives rise to circumstances that place a reasonable person on notice of potential illegality."[201]

Third, the court conducted a balancing test to measure the state's interest in protecting children against an individual's right to defend against charges of statutory rape by claiming a reasonable mistake-of-age defense.[202] Considering the risks associated with childhood sexual activity, including physical and psychological harm, sexually transmitted diseases, trauma, and teenage pregnancies, the court easily reached the conclusion that the state's interest in protecting children was compelling.[203] The court relied upon the Supreme Court's analysis, stating that "'[t]he prevention of sexual exploitation and abuse of

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195. *Id.*

196. *Id.* at 675, 724 A.2d at 49 (citing State v. Guest, 583 P.2d 836 (Alaska 1978)). The court noted that the *Guest* holding "appears to be based on state, and not federal, constitutional analysis." *Id.*

197. *Id.* at 675 n.6, 724 A.2d at 49 n.6 (citing State v. Rice, 626 P.2d 204 (Alaska 1981)).

198. *Id.* at 676-77, 724 A.2d at 50.

199. *Id.* at 676, 724 A.2d at 49.

200. *Id.* at 679, 724 A.2d at 51.

201. *Id.* at 680, 724 A.2d at 51.

202. *Id.* at 681, 724 A.2d at 52.

203. *Id.* at 681-82 & n.11, 724 A.2d at 52 & n.11.

children constitutes a government objective of surpassing importance.'"[204] The *Owens* majority also found that the statutory rape law furthered a significant state interest while only minimally intruding on the constitutional rights of the innocent minded.[205]

Finally, the court considered whether section 463(a)(3) creates an irrebuttable presumption that the child's mental state is irrelevant and that consent is impossible below the age of fourteen.[206] In rejecting this argument, the court reasoned that the statute was not concerned with inferences or presumptions at all.[207] Rather, the statute uniformly prohibits sexual intercourse with children under the age of consent.[208] The court distinguished *Lafleur*, *Vlandis*, *Stanley*, and *Mahoney* because each of these cases used one fact to validate a different fact, which bore little relation to the objective of the statute.[209] For instance, in *Stanley*, the statute presumed that all unmarried fathers were inadequate parents.[210] In contrast, the *Owens* majority held that the Maryland statutory rape law does not presume intent or inability of a child under fourteen to consent; rather, it protects children from sexual exploitation, regardless of whether the victim's participation was consensual.[211] Furthermore, the court maintained that even if the statute contains an irrebuttable presumption that children under fourteen are incapable of consenting, the "nexus" between the presumption and the state's compelling interest is adequate to alleviate due process concerns.[212] Thus, the court upheld the constitutionality of section 463(a)(3).[213]

Judge Eldridge concurred with the result, but did not join in the majority opinion.[214] In his concurring opinion, he stated that "[i]t is unreasonable to assume that the Legislature intended for one to be convicted under 463(a)(3), or under any of the other statutes proscribing sexual activity with underage persons, regardless of his or her

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204. *Id.* at 681, 724 A.2d at 52 (quoting New York v. Ferber, 458 U.S. 747, 757 (1982) (affirming the defendant's conviction for "knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances" and finding that child pornography is not protected by the First Amendment)).

205. *Id.* at 685, 724 A.2d at 54.

206. *Id.* at 687, 724 A.2d at 55.

207. *Id.*

208. *Id.* at 687-88, 724 A.2d at 55.

209. *Id.* at 688, 724 A.2d at 55.

210. *Id.* (citing Stanley v. Illinois, 405 U.S. 645, 650 (1972)).

211. *Id.* at 688-89, 724 A.2d at 55-56.

212. *Id.* at 689, 724 A.2d at 56.

213. *Id.* at 690, 724 A.2d at 56.

214. *Id.* at 691, 724 A.2d at 57 (Eldridge, J., concurring).

mental state."[215] Judge Eldridge refused to accept that the statute applied to cases involving mentally disabled persons who could not comprehend the act of sexual intercourse.[216] Thus, Judge Eldridge disagreed with the strict liability construction of section 463(a)(3), but he supported the majority's holding that mentally competent violators are sufficiently notified when they engage in sexual intercourse with a child near the statutory age and are therefore morally blameworthy.[217] Judge Eldridge argued that the ordinary defendant who has sex with a young woman knows that he might be engaging in intercourse with a minor, that such behavior is morally improper, and that consent by a minor may be ineffective.[218]

Chief Judge Bell, joined by Judge Cathell, dissented.[219] The dissent argued "that due process both under the Fourteenth Amendment and under the Declaration of Rights, precludes strict criminal liability for statutory rape" and that the defendant's conviction should have been reversed.[220] Specifically, the dissent argued that a culpable mental state has long been, and continues to be, an essential element of a criminal offense; that non-public-welfare offenses must contain a *mens rea* requirement or be found unconstitutional; and that the statute violated the defendant's procedural and substantive due process rights by creating an irrebuttable presumption and by broadly tailoring to state interests, respectively.[221]

The dissent argued that non-public-welfare offenses, which carry harsh criminal penalties, must contain a *mens rea* requirement.[222] Applying the principle to *Owens*, the dissent reasoned that "[i]t is of little consequence to the [defendant] that he was not sentenced to 20 years in prison, because he will be forever branded with the stigma of being

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215. *Id.* at 692, 724 A.2d at 57.

216. *Id.* at 692-93, 724 A.2d at 57-58.

217. *Id.* at 693, 724 A.2d at 58. Judge Eldridge explained in *Garnett* that he believed that the *mens rea* element of section 463(a)(3) was the "ab[ility] to appreciate the risk involved by intentionally and knowingly engaging in sexual activities with a young person." Garnett v. State, 352 Md. 571, 591, 632 A.2d 797, 807 (1993) (Eldridge, J., dissenting).

218. *Owens*, 352 Md. at 692, 724 A.2d at 57 (Eldridge, J., concurring). Judge Eldridge stated:

> Although in a particular case the defendant may honestly but mistakenly believe, because of representations or appearances, that the other person is above the age of consent, the ordinary defendant in such case is or ought to be aware that there is a risk that the young person is not above the age of consent.

Id.

219. *Id.* at 695 (Bell, C.J., dissenting).

220. *Id.* at 696, 706, 724 A.2d at 59, 64.

221. *Id.* at 694-706, 724 A.2d at 58-64.

222. *Id.* at 695, 724 A.2d at 59.

a child sex offender."[223] Thus, the dissent believed that, because of the enormous adverse impact of the defendant's conviction, the mistake-of-age defense should have been permitted.[224]

The dissent focused primarily on the fundamentals of due process, arguing that

> [t]he failure of section 463(a)(3) to require proof of a culpable mental state conflicts both with the substantive due process ideal requiring that the defendants possess some level of fault for a criminal conviction of statutory rape and the procedural due process ideal requiring that the prosecution overcome the presumption of innocence . . . .[225]

The dissent further argued that, under procedural due process, the defendant should have been given the opportunity to present a defense.[226] By denying the defendant a mistake-of-age defense, the dissent maintained that Owens fell victim to an irrebuttable presumption that his knowledge or intent about the girl's age was irrelevant.[227] While Judges Bell and Cathell conceded that sex with a minor is not a fundamental right, they underscored the fact that procedural due process is a fundamental right of every criminal defendant, and when a statute interferes with fundamental rights, it must address a compelling state interest in the least intrusive way.[228] Because the statute was not narrowly tailored, the dissent asserted that it violated the defendant's due process rights.[229]

4. Analysis.—Although protecting children from physical and emotional harm is a paramount concern, *Owens* propelled the Maryland statutory rape law beyond its constitutional due process limits. By misinterpreting legislative intent, by conducting nebulous balancing between the state's interests and the defendant's fundamental liberty interests, and by ignoring precedential guidelines, the majority erroneously placed judicially construed policy considerations above fundamental rights.

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223. *Id.* at 706, 724 A.2d at 64 (citation omitted).

224. *Id.*

225. *Id.* at 695, 724 A.2d at 59.

226. *Id.* at 700, 724 A.2d at 61.

227. *Id.* at 701, 724 A.2d at 62.

228. *Id.* at 702-03, 724 A.2d at 62-63.

229. *See id.* at 703, 724 A.2d at 63 (Bell, C.J., dissenting).

a. Maryland Legislative History and Strict Liability Jurisprudence.—

(1) Elimination of Mens Rea.—The legislative history behind Maryland's Criminal Code suggests that express statutory language is required to negate the *mens rea* element of a crime.[230] The *Garnett* majority considered the legislative history behind section 463(a)(3).[231] Specifically, the court reviewed proposed amendments to section 463(a)(3) in 1976, including the addition of express language requiring knowledge as to age, which was rejected before the amendments became law.[232] The *Garnett* majority concluded that "the Legislature explicitly raised, considered, and then explicitly jettisoned any notion of a *mens rea* element with respect to the complainant's age in enacting the law that formed the basis of current § 463(a)(3)."[233] However, further review of the legislative history behind Maryland's Criminal Code provides:

> Although no culpable mental state is expressly designated in a statute defining an offense, a culpable mental state may nevertheless be required for the commission of such offense, or with respect to some or all of the material elements thereof, if the prescribed conduct necessarily involves such culpable mental state. *A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability.*[234]

The Commission on Criminal Law added that "[t]he construction suggestion in [the foregoing paragraph] . . . is probably desirable insurance against inadvertent omissions of references to mental state by draftsmen."[235] Therefore, when criminal statutory language does not communicate any express legislative intent to impose strict liability, mental culpability should be required for the offense, regardless of proposed and rejected amendments.

Even if the legislature intended a strict liability offense, section 463(a)(3) is not automatically rendered constitutional. Indeed, the *Owens* majority acknowledged that "[*a*]*bsent any constitutional prohibi-*

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230. *See infra* text accompanying note 234 (providing the text of the proposed Criminal Code of Maryland in 1974, which supports a *mens rea* requirement unless strict liability is expressly intended by the legislature).

231. Garnett v. State, 332 Md. 571, 585-88, 632 A.2d 797, 804-05 (1993).

232. *Id.*

233. *Id.* at 587, 632 A.2d at 805.

234. LEGIS. COUNCIL OF MD., PROPOSED CRIMINAL CODE OF MARYLAND § 15.15(2) (1974) (emphasis added).

235. *Id.* § 15.15 cmt.

tion," the legislature may define crimes and fix their punishments.[236] Under the Fourteenth Amendment, procedural due process requires notice and the "*opportunity to present a defense.*"[237] Therefore, denial of the opportunity to defend oneself impinges on the defendant's right to due process granted by the United States Constitution and the Maryland Declaration of Rights.[238]

(2) Affirmative Defenses and Constitutionality.—Several states allow an affirmative defense to be raised against a charge of statutory rape.[239] An affirmative defense is defined as "a matter which, assuming the charge against the accused to be true, constitutes a defense to it; an 'affirmative defense' does not directly challenge any element of the offense."[240] Even strict liability statutes for criminal offenses do not always preclude affirmative defenses.[241] Although states have some power to regulate affirmative defenses, regulations must not violate due process.[242] Consistent with due process, a defendant is only required to produce *some evidence* of his mistake of fact.[243] If the defendant is successful, the State must present evidence to disprove the defense.[244]

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236. *Owens*, 352 Md. at 674, 724 A.2d at 48 (emphasis added).

237. *Id.* at 700, 724 A.2d at 61 (Bell, C.J., dissenting) (emphasis added).

238. *See supra* text accompanying notes 22 & 23 (providing the text of the Fourteenth Amendment and the Maryland Declaration of Rights).

239. *See, e.g.*, COL. REV. STAT. § 18-3-406 (2000) (making available an affirmative defense if the defendant reasonably believed the child to be eighteen years of age or older); 720 ILL. COMP. STAT. ANN. 5/12-17(b) (West 1999) (providing an affirmative defense if the defendant reasonably believed that the victim was seventeen years old); MONT. CODE ANN. § 45-5-511 (1998) (providing an affirmative defense if the defendant reasonably believed that the person was older than sixteen and the person was actually fifteen or sixteen); OR. REV. STAT. § 163.325 (1997) (providing an affirmative defense if the defendant reasonably believed that the person was over the specified age of consent).

240. 21 AM. JUR. 2D *Criminal Law* § 217 (1998).

241. *Id.*; *see also* United States v. United States Dist. Court for the Cent. Dist. of Cal. [*Kantor*], 858 F.2d 534, 542-43 (9th Cir. 1988), *aff'g* United States v. Kantor, 677 F. Supp. 1421 (C.D. Cal. 1987) (holding that a good-faith mistake-of-age defense is compatible with strict liability doctrine, especially when constitutional rights are threatened).

242. *Kantor*, 858 F.2d at 543. The *Kantor* majority stated that "even as compelling a societal interest as the protection of minors must occasionally yield to specific constitutional guarantees." *Id.*

243. *Id.*; *see also infra* text accompanying note 261 (outlining Maryland's evidentiary approach to affirmative defenses); Dykes v. State, 319 Md. 206, 216-17, 571 A.2d 1251, 1257 (1990).

> *Some evidence* [of an affirmative defense] is not strictured by the test of a specific standard. It calls for no more than what it says—"some," as that word is understood in common, everyday usage. It need not rise to the level of "beyond reasonable doubt" or "clear and convincing" or "preponderance."

Dykes, 319 Md. at 216-17, 571 A.2d at 1257.

244. *Kantor*, 858 F.2d at 543.

In 1974, the Maryland Commission on Criminal Law expressly allowed an affirmative defense to statutory rape when the illegality of the offense was not known to the defendant.[245] The Commission stated:

> A belief that conduct does not legally constitute an offense is an affirmative defense to a prosecution for that offense based upon such conduct when the statute or other enactment defining the offense is not known to the defendant and has not been published or otherwise reasonably made available prior to the conduct alleged.[246]

It is difficult to imagine that Owens, an eighteen-year-old high school graduate with no prior criminal history, knew that having sexual intercourse with another consenting teenager was illegal and could result in twenty years of imprisonment and being labeled a child sex offender. In addition, Owens honestly believed that his partner was above the age of legal consent.[247] Therefore, he had no reason to believe that his actions were illegal, and an affirmative defense should have been afforded to him.

Maryland's highest court, of course, recognizes affirmative defenses.[248] However, the holding in *Owens* relies heavily on *Garnett*, while managing to contradict its own policy regarding affirmative defenses in *Outmezguine*. In *Garnett*, the court held that "Maryland's second degree rape statute defines a strict liability offense that does not require the State to prove *mens rea*; *it makes no allowance for a mistake-of-age defense*."[249] The *Garnett* majority reasoned that the statutory rape law was silent as to *mens rea* by legislative design, because the legislature would have included express language of scienter—as it did in the immediately preceding subsection of the statute—if it had intended a *mens rea* element.[250] The court used a similar line of reasoning in *Outmezguine*, comparing subsections of Maryland's child pornography law and concluding that express language as to *mens rea* was intentionally excluded to define a strict liability offense.[251] However, in *Outmezguine*, the court attempted to uphold the statute's con-

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245. LEGIS. COUNCIL OF MD., PROPOSED CRIMINAL CODE OF MARYLAND § 15.20(4) (1974).

246. *Id.*

247. Record Extract at E15.

248. *See* Outmezguine v. State, 335 Md. 20, 47, 641 A.2d 870, 883 (1994).

249. Garnett v. State, 332 Md. 571, 584-85, 632 A.2d 797, 803-04 (1993) (emphasis added).

250. *Id.* at 585, 632 A.2d at 804.

251. *Outmezguine*, 335 Md. at 43-44, 641 A.2d at 882.

stitutionality by allowing an affirmative mistake-of-age defense to be raised by violators of the statute.[252]

The *Outmezguine* majority concluded that "a defendant indicted under § 419 A(c) [is permitted] to argue that he was reasonably mistaken about a child's age."[253] Although the defendant argued that permitting a reasonable mistake-of-age defense was inconsistent with eliminating the *mens rea* element, the court reasoned that it was "not unreasonable" for a strict liability statute to exclude a scienter element, but to allow a defendant to raise a mistake-of-age defense.[254] The *Outmezguine* majority offered no further explanation for the apparent conflict, but it is reasonable to conclude that the legislature's intent was directed at upholding the constitutionality of the statute.[255] Indeed, proposed amendments to section 419 A(c) were embodied in House Bill 243, which contained explicit language eliminating the mistake-of-age defense.[256] This language was removed immediately after the American Civil Liberties Union testified that the bill would be unconstitutional without a scienter element.[257] The *Outmezguine* majority acknowledged that "the prompt action by the Legislature most likely can be directly attributed to the ACLU's concerns."[258]

Thus, *Outmezguine* acknowledged the availability of a mistake-of-age defense, but declined to consider it because the defendant in that case had not raised the issue at trial.[259] Although only in dicta, the *Outmezguine* majority recognized that a strict liability crime may allow for an affirmative mistake-of-age defense, presumably in order to avoid constitutional roadblocks inherent to a strict liability statute.[260] The court went on further to describe a method of applying the reasonable mistake-of-age defense:

> "Before the State's burden affirmatively to prove the defendant's mental state kicks in, the defendant must have generated the issue by producing 'some evidence' supporting his or her claim of mistake of fact. If the defendant generates the issue, the State must prove beyond a reasonable doubt

252. *Id.* at 52, 641 A.2d at 886.

253. *Id.* at 47, 641 A.2d at 883.

254. *Id.* at 49, 641 A.2d at 884.

255. *See infra* notes 256-258 and accompanying text (discussing the legislative history of section 419A(c) of the Maryland Code).

256. *Outmezguine*, 335 Md. at 46, 641 A.2d at 883 (discussing H.B. 243, 1989 Sess. (Md. 1989)).

257. *Id.* at 46-47, 641 A.2d at 883.

258. *Id.* at 47, 641 A.2d at 883.

259. *Id.* at 52, 641 A.2d at 886.

260. *Id.*

that the act was committed without any mistake of fact—that the defendant acted intentionally and knowingly."[261]

b. Constitutional Calculus: States' Interests v. Fundamental Rights.—In addition to violating the defendant's procedural due process right to present an affirmative defense, the court's interpretation of Maryland's statutory rape law also violated his substantive due process rights.[262] The Supreme Court's interpretation of the Due Process Clause of the Fourteenth Amendment defines two different types of constitutional protections: procedural due process and substantive due process.[263] Procedural due process requires adequate notice and an *opportunity to defend.*[264] Substantive due process protects fundamental rights, or those rights "fundamental to the American scheme of justice."[265] The Supreme Court has determined that most of the rights enumerated in the Bill of Rights, including the Due Process Clause of the Fifth Amendment, are fundamental.[266] Although the Fifth Amendment binds only the federal government, most of its provisions are also applicable to the states under the Fourteenth Amendment.[267] Therefore, the right to present a defense, as guaranteed by the Fifth and Fourteenth Amendments, is a fundamental right. Indeed, Justice Ginsburg recently explained that "[b]asic to due process in criminal proceedings is the right to a full, fair, potentially effective

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261. *Id.* at 51, 641 A.2d at 885 (citations omitted) (quoting Garnett v. State, 332 Md. 571, 594 n.3, 632 A.2d 797, 808 n.3 (1993) (Bell, C.J., dissenting)).

262. *See Owens*, 352 Md. at 702, 724 A.2d at 62 (Bell, C.J., dissenting) (asserting that the "fundamental due process right to present a defense, [is] a right guaranteed to every criminal defendant").

263. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) (explaining the two types of constitutional protections).

264. *See, e.g.*, Travelers Indem. Co. v. Nationwide Constr. Corp., 244 Md. 401, 406, 224 A.2d 285, 288 (1966); *see also supra* note 25 and accompanying text (explaining the procedural due process requirements of notice and an opportunity to defend).

265. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

266. Palko v. Connecticut, 302 U.S. 319, 325 (1937); McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (distinguishing between procedural and substantive due process rights and discussing the fundamental nature of such rights).

267. *See* Richard L. Aynes, *Refined Incorporation and the Fourteenth Amendment*, 33 U. RICH. L. REV. 289, 300 (1999) (discussing incorporation doctrine as applied to the Bill of Rights and the Fourteenth Amendment of the United States Constitution). Richard Aynes states that "with the onward march of the 'selective' enforcement of the Bill of Rights, the Court came to apply all elements of the First Amendment, the Fourth Amendment, [and] the Fifth Amendment, with the exception of the grand jury provisions . . . against the states." *Id.*

opportunity to defend against the State's charges. [The defendant] was not accorded that *fundamental* right . . . ."[268]

When a state statute impinges a fundamental right, substantive due process requires that the statute be narrowly tailored to achieve a compelling state interest.[269] What constitutes a compelling state interest was answered by the Supreme Court in *Lochner v. New York*.[270] The *Lochner* Court explained:

> In every case that comes before this court, therefore, where legislation [concerning a state police power] is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty . . . .[271]

The Court continued:

> The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their claimed purpose.[272]

Sixty years later, in *Griswold v. Connecticut*,[273] the Supreme Court stated that a "'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"[274] In that case, the Supreme Court explained that state statutes that impinge on fundamental rights must be the least burdensome means to achieve compelling interests.[275] A statute that impinges fundamental rights must involve a compelling state interest, and it must be narrowly tailored to that interest, or the statute fails constitutional muster under strict scrutiny analysis.[276]

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268. *See* Gray v. Netherland, 518 U.S. 152, 171 (1996) (Ginsburg, J., dissenting) (emphasis added).

269. *See supra* note 4 (discussing the strict scrutiny standard in constitutional analysis).

270. 198 U.S. 45 (1905).

271. *Id.* at 56.

272. *Id.* at 64.

273. 381 U.S. 479 (1965).

274. *Id.* at 485 (quoting NAACP v. Alabama, 377 U.S. 288, 307 (1964)).

275. *Id.*

276. *See supra* note 4 (outlining the Supreme Court's approach to strict scrutiny analysis).

(1) Reducing Teenage Pregnancies and Exploitation: Compelling State Interests.—The *Owens* majority correctly identified the protection of children from harm as a compelling interest;[277] the statute, however, must also be narrowly tailored to achieve this interest, because it affects the fundamental right to present a defense. The Maryland statutory rape law, as written, is not the least burdensome means of protecting children from harm. Owens was an eighteen-year-old high school graduate with positive plans for the future and no prior criminal history, who engaged in consensual sexual intercourse with someone who he reasonably believed to be sixteen years old.[278] Because he was not afforded a mistake-of-age defense, he faces his future as a convicted criminal and registered sex offender, which severely limits his opportunities to be a productive member of society.[279] This result seems overinclusive and offends basic notions of fairness. Judge Eldridge's hypothetical example in his concurring opinion illustrates the point effectively: "'[P]resumably a 20 year old, who passes out because of drinking too many alcoholic beverages, would be guilty of a sexual offense if a 13 year old engages in various sexual activities with the 20 year old while the latter is unconscious. I cannot imagine that the General Assembly intended any such result.'"[280] Similarly, it is also hard to believe that the General Assembly intended to impose strict liability and lengthy prison terms on responsible, otherwise law-abiding teenagers, who engage in consensual sexual intercourse. Because the Maryland statutory rape law does not address such situations, it is overly broad and violates substantive and procedural due process.[281]

The nexus between Maryland's interest in protecting children and its statutory rape law can also be measured by whether that interest is actually furthered by denying the mistake-of-age defense for statutory rape.[282] For instance, the *Owens* majority stated that the rape statute was properly designed to protect children's health, including the prevention of teenage pregnancies.[283] However, the degree to

277. *Owens*, 352 Md. at 681, 724 A.2d at 52.

278. *Id.* at 667, 724 A.2d at 45.

279. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 910 (1995) (describing the challenges that sex offenders face when reintegrating into the community).

280. *Owens*, 352 Md. at 693, 724 A.2d at 58 (Eldridge, J., concurring) (quoting Garnett v. State, 332 Md. 571, 592, 632 A.2d 797, 807 (1993) (Eldridge, J., dissenting)).

281. *See id.*

282. *See* United States v. Ransom, 942 F.2d 775, 778 (10th Cir. 1991) (holding that statutory rape laws must legitimately further the government's interest in protecting children from sexual exploitation).

283. *Owens*, 352 Md. at 681-82, 724 A.2d at 52.

which the statute accomplishes these important tasks is unknown, and reductions in teenage pregnancy rates may be completely unrelated to the enforcement of statutory rape laws. For instance, Alaska is one of the only states that mandates a mistake-of-age defense to statutory rape,[284] but Alaska also had the second highest reduction in teenage birth rates from 1991 to 1995.[285] Similarly, on an international scale, the teenage pregnancy rate in the United States is approximately three to five times higher than in Canada or Britain.[286] Despite these discouraging statistics, both Canada and Britain allow a reasonable mistake-of-age defense to statutory rape, while most U.S. states do not.[287] These facts indicate that there are more important factors than prohibiting a mistake-of-age defense in reducing teenage pregnancies, such as curtailing poverty and racism.[288] Indeed, teen parenthood is associated with poor educational or employment opportunities, low wages, unstable marriages, and prolonged welfare dependency.[289]

Many observers believe that the current focus on statutory rape in the United States reflects the frustration of politicians searching for a "magic bullet" to solve the problem of adolescent pregnancy, rather than actual concern for children's welfare.[290] Others believe that positive results will occur when legislatures invest more money in women's and children's health, education, and well-being, rather than in

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284. ALASKA STAT. § 11.41.445 (2001) (allowing an affirmative mistake-of-age defense to statutory rape when the defendant reasonably believes that his sexual partner is of consenting age and the child is at least thirteen years old).

285. MASS. MED. SOC'Y, *State-Specific Birth Rates for Teenagers—United States, 1990-1996*, *in* CENTERS FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WEEKLY REPORT, Vol. 46, No. 36, Sep. 12, 1997, at 4 tbl.2.

286. *See* Victor C. Strasburger, *Getting Teenagers to Say* No *to Sex, Drugs, and Violence in the New Millenium*, 84(4) MED. CLINICS OF N. AM. 787, 795 (2000).

287. *See* R.S.C., ch. C-46, § 150.1 (1985) (Can.) (providing a mistake-of-fact defense for the offenses of sexual interference and touching if the accused has taken "all reasonable steps to ascertain the age of the complainant"); Sexual Offences Act, 1956, ch. 69, § 6(3) (Eng.) ("[A] man is not guilty of [statutory rape] . . . if he is under the age of 24 and has not previously been charged with a like offence, and he believes her to be of the age of 16 or over and has reasonable cause for the belief." (footnote omitted)). England's mistake-of-age defense is known as "the young man's defence." *See* HOME OFFICE, SETTING THE BOUNDARIES: REFORMING THE LAW ON SEX OFFENCES 35 (2000).

288. *See* Patricia Donovan, *Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?*, 29(1) FAM. PLANNING PERSP. 30, 34 (1997) (quoting Mary Margaret Wilson from the New York Council on Adolescent Pregnancy: "'People are so eager to blame one cause [for teenage pregnancy] so the situation can be fixed . . . . People don't want to look at bigger things like poverty and racism.'").

289. Natalie Pierre & Joanne Cox, *Teenage Pregnancy Prevention Programs*, 9(4) CURRENT OPINION IN PEDIATRICS 310, 310 (1997).

290. *See* Donovan, *supra* note 288, at 30.

targeting males who violate statutory rape laws.[291] Moreover, in a survey of mothers between the ages of fifteen and seventeen, conducted by the National Center for Health Statistics, younger mothers in the group were much more likely to have a sexual partner who was five or more years older.[292] These results suggest that the Maryland statutory rape law might be targeting the wrong age population for teenage pregnancy reduction by focusing on males under the age of twenty.[293]

While it is conceivable that statutory rape laws might deter sexual behavior and reduce health problems and pregnancies, denying a mistake-of-age defense does not appear to be the most narrowly tailored way to accomplish the compelling state objective of reducing teenage pregnancy. If the Maryland statutory rape law had "a more direct relation, as a means to [the] end" of teenage pregnancy reduction, the constitutional hurdle would be lowered.[294]

(2) Controlling STDs Through Statutory Rape Laws: Misguided Legislation.—The *Owens* court also identified the reduction of sexually transmitted diseases as a compelling state interest.[295] Again, since the statutory rape law affects the fundamental right to present a defense, the statute must be narrowly tailored to pass constitutional muster. The overwhelming majority of sexually transmitted diseases reported for ten- to nineteen-year-old adolescents occur in the economically disadvantaged populations, where drug abuse and violence occur more frequently.[296] While a lack of adequate educational opportunities is partially to blame, young women in these groups may be more likely to seek out older male partners who have jobs, cars, and money to spend.[297] Although a statute that discriminates between groups might arguably violate the Equal Protection Clause,[298] legislation

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291. *Id.*

292. Laura Duberstein Lindberg et al., *Age Differences Between Minors Who Give Birth and Their Adult Partners*, 29(2) FAM. PLANNING PERSP. 61, 62 (1997).

293. *See supra* note 12 and accompanying text (quoting MD. ANN. CODE art. 27, § 463(a)(3) (1996), which sets forth the statutory age requirements for defendants who are subject to Maryland's second-degree rape law).

294. Lochner v. New York, 198 U.S. 45, 57 (1905).

295. *See Owens*, 352 Md. at 681-82, 724 A.2d at 52.

296. DEP'T HEALTH & HUM. SERVICES, *Sexually Transmitted Disease Surveillance, 1998*, Centers for Disease Control and Prevention, National Center for STD, HIV, and TB Prevention, Sept. 1999, at 59-60; *see also* F. DOUGLAS SCUTCHFIELD & C. WILLIAM KECK, PRINCIPLES OF PUBLIC HEALTH PRACTICE 250 (1997) (identifying those with lower incomes as being far more likely to need treatment for drug dependence); *see also id.* at 345 (identifying homicide as the second leading cause of death for young African-American males and females).

297. *See* Lindberg, *supra* note 292, at 63 (arguing that, to a teenager looking for a sexual partner, men in their twenties may appear more economically desirable).

298. U.S. CONST. amend. XIV, § 1.

aimed at improving education and reducing poverty and violence may reduce childhood sexually transmitted diseases more effectively than strict liability statutory rape laws.[299] Regulating destructive internet and media influences, providing appropriate sex education programs and confidential community services, and encouraging parental involvement can also help teenagers avoid high-risk behaviors.[300] Thus, by focusing on true problem areas, it is likely that the state could achieve its compelling interests more effectively than by its attempt as set forth in section 463, and thereby could avoid constitutional roadblocks.

(3) Public Policy v. Constitutional Rights.—Finally, the balancing test used in *Owens* weighed the protection of children against "any interest that the individual may have in engaging in sexual relations with children near the age of consent."[301] However, the real interest at stake was the defendant's constitutional right to due process.[302] Therefore, the majority's balancing test was conducted erroneously. When fundamental procedural due process interests are violated, substantive due process requires that the state's interests are compelling, and that the statute is narrowly tailored.[303] Because the Maryland statutory rape law is subjectively overinclusive, it does not pass constitutional muster.[304]

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299. *See supra* note 296 and accompanying text (stating economic and demographic risk factors for sexually transmitted diseases).

300. *See* Steven J. Hudson, *Internet Sex and the Public's Health*, 46(2) MED. TRIAL TECH. Q. 313, 314 (1999) (arguing that because young women and children are most commonly exploited on the internet, they are at increased risk for sexual abuse); *see also* Strasburger, *supra* note 286, at 787.

301. *Owens*, 352 Md. at 683, 724 A.2d at 53.

302. *Id.* at 702, 724 A.2d at 62 (Bell, C.J., dissenting).

303. *See supra* note 4 (outlining the Supreme Court's approach to strict scrutiny analysis).

304. In support of the conclusion that statutory rape laws that deny a reasonable mistake-of-age defense are unconstitutional, several states have enacted amendments to existing statutory rape laws, presumably to maintain constitutionality. *See supra* note 239 (listing revised state statutes permitting an affirmative mistake-of-age defense). Moreover, Delaware and Georgia impose increased sentences only when the defendant is significantly older than the minor, and California imposes civil penalties from $2000 to $25,000, depending on the age of the defendant and the age difference between the parties. *See* DAVIS & TWOMBLY, *supra* note 29, at 3; *see also* DEL. CODE ANN. tit. 11, § 771 (2000) (imposing an increased sentence when the defendant is ten or more years older than a minor victim under sixteen); GA. CODE ANN. § 16-6-3 (2000) (increasing the sentence for statutory rape to twenty years if the defendant is twenty-one or older); CAL. PENAL CODE § 261.5 (Deering 2001) (providing civil penalties for statutory rape). Thus, many states recognize that statutory rape laws must allow an affirmative defense for defendants.

c. Ignorance of Precedential Guidelines.—

(1) The Regulation/Punishment Distinction.—Although most states have rejected constitutional attacks on strict liability offenses, the Supreme Court is more likely to impose a *mens rea* element in seemingly strict liability statutes when the statute defines a common-law offense versus a public welfare offense.[305] Unlike common-law offenses, such as rape and murder, public welfare offenses are regulatory in nature and usually involve light fines or penalties.[306] Examples of public welfare offenses include traffic violations, non-compliance with liquor laws, and commercial misrepresentation.[307] Indeed, the penalties for public welfare offenses are "'so slight that the courts can afford to disregard the individual in protecting the social interest.'"[308] Both the United States Supreme Court and the Court of Appeals of Maryland recognize that common-law offenses warrant special protection, and, to protect constitutionality, both courts impose *mens rea* elements on statutes defining common-law offenses.[309] Additionally, both courts have held that harsh penalties that attach to violations of a statute are a "significant consideration in determining whether the statute should be construed as dispensing with *mens rea.*"[310] Maryland's statutory rape law imposes a penalty of up to twenty years imprisonment, and section 792 labels one who violates section 463 as a "sexually violent offender," and requires them to register as a sex offender.[311] Despite these severe penalties for the common-law offense of rape, the *Owens* majority erroneously dispensed with *mens rea* and held section 463(a)(3) constitutional.

(2) Passivity, Permissiveness, and Constitutionality.—In *Lambert v. California*,[312] the Supreme Court held that due process required the

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305. *See* United States v. X-Citement Video, 513 U.S. 64, 71-72 (1994).

306. Dawkins v. State, 313 Md. 638, 644, 547 A.2d 1041, 1044 (1988).

307. *Id.*; *see supra* notes 112-113 and accompanying text (providing other examples of public welfare offenses).

308. *Dawkins*, 313 Md. at 644, 547 A.2d at 1044 (quoting Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 70 (1933)).

309. *Id.*; *see also supra* note 112 and accompanying text (noting the Supreme Court's view in *Morissette* that *mens rea* should attach to common-law crimes).

310. Staples v. United States, 511 U.S. 614, 616 (1994); *see Dawkins*, 313 Md. at 644, 547 A.2d at 1044 (stating that courts can afford to disregard individual rights when penalties are light).

311. *See supra* note 12 (quoting the relevant language of MD. ANN. CODE art. 27, § 463(a)(3) (1996)). Section 463(b) of the Maryland Code states: "Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for a period of not more than 20 years." MD. ANN. CODE art. 27, § 463(b); *see also id.* § 792 (requiring those who violate section 463 to register as violent sex offenders).

312. 355 U.S. 225 (1957).

State to prove *mens rea* when criminal conduct was *passive*.[313] The Court distinguished active conduct as "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed."[314] While consensual intercourse between two teenagers might be considered *active*, an alternative view of teenage sexual conduct is one of passivity or permissiveness. Indeed, the word *passive* is defined as "inactive," "permissive," "consisting in . . . submission"[315] or "receptive to outside impressions or influences."[316] In modern society, it is equally believable that once two young people decide to have consensual intercourse, they engage in passive or permissive conduct. This is especially true for the party who did not initiate the sexual encounter. For the purposes of *Lambert*, the conduct only becomes active when the defendant knows that he is engaging in criminal conduct.[317] In *Owens*, the defendant reasonably believed his partner to be sixteen years old and was ignorant that he was engaging in criminal conduct.[318] He was also using a condom, which demonstrated responsibility.[319] Thus, his actions were entirely passive with respect to criminal intent.

In the present day, it is absurd to think that when two consenting teenagers engage in sexual intercourse, they will be familiar with the elemental and punitive details of statutory rape laws. In punishing young people so harshly, the Maryland Legislature may be accomplishing more public harm than good by undermining their potential as productive members of society, and by wasting financial resources in pursuing criminal convictions and in imprisoning young offenders.[320] Instead, these resources could be used to educate high-risk groups about the negative consequences of sexual intercourse, includ-

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313. *Id.* at 228; *see also supra* notes 114-120 and accompanying text (discussing the facts and holding of *Lambert*).

314. *Lambert*, 355 U.S. at 228.

315. BLACK'S LAW DICTIONARY 1124 (6th ed. 1990).

316. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 860 (9th ed. 1991).

317. *See Lambert*, 355 U.S. at 228. The court explained: "But the principle [of notice] is equally appropriate where a person, wholly *passive and unaware of any wrongdoing*, is brought to the bar of justice for condemnation in a criminal case." *Id.* (emphasis added).

318. Brief for Appellant at 13, *Owens* (No. 1266).

319. *Id.* at 4; *see also* Joseph J. Murphy & Scott Boggess, *Increased Condom Use Among Teenage Males, 1988-1995: The Role of Attitudes*, 30(6) FAMILY PLANNING PERSP. 276, 276 (1998) (concluding that increases in condom usage are due to increasing male contraceptive responsibility and fear of contracting HIV).

320. *See* Donovan, *supra* note 288, at 30 (arguing that enforcement of statutory rape laws may discourage teenagers from seeking reproductive health care for fear of disclosure and prosecution); *see also* Bedarf, *supra* note 279, at 910 ("By informing the public of a sex offender's presence, community notification laws jeopardize an offender's chances of reintegrating into society and leading a productive life.").

ing unwanted pregnancies and sexually transmitted diseases. While section 463(a)(3) is overinclusive when applied to individuals like the defendant in *Owens*, punishment should be imposed on adults whose ages do not border the dividing line between statutory and non-statutory rape.[321] Older adults, such as those in their twenties, are more likely to be aware that they may be running afoul of state rape laws when they engage in sexual intercourse with a young person.

5. Conclusion.—Although *Owens* is commendable for its honorable intentions toward children, the court deprived the defendant of his due process rights by denying his affirmative mistake-of-age defense and broadly tailoring to state interests while ignoring the defendant's fundamental rights. Although state legislatures may enact strict liability crimes without the element of *mens rea*, due process of law remains a constitutional right for all criminal defendants. If the fundamental right of procedural due process is impaired by statute, the statute must be narrowly tailored to achieve a compelling state interest. While protecting children from physical and emotional harm is indeed compelling, Maryland's statutory rape law is overinclusive and unconstitutional in its effect. In *Owens*, disallowing an affirmative mistake-of-age defense and convicting a responsible eighteen-year-old boy for engaging in protected, consensual sexual intercourse with a girl, whom he reasonably believed to be well above the age of consent, operated ineffectively to thwart "the potentially devastating effects of sexual abuse and exploitation."[322] Children's interests would be better served by legislative efforts that improve education and reduce poverty and violence. Socioeconomic and educational reform, in turn, will reduce adolescent risk-taking behaviors, including premature sexual activity.

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321. *See Owens*, 352 Md. at 667, 724 A.2d at 45 (noting that Timothy Owens was eighteen years old).

322. *See id.* at 690, 724 A.2d at 56.

C. *Maryland's Court Steals the Dangerous Weapons Determination in an Armed Robbery Analysis*

In *Handy v. State*,[1] the Court of Appeals considered whether pepper spray qualified as a dangerous or deadly weapon for the purpose of proving the crime of armed robbery, and concluded that mace or pepper spray could constitute a dangerous weapon when used offensively to commit a robbery.[2] In arriving at this conclusion, the court established a unique standard for determining whether an object that is not *per se* dangerous or deadly can nevertheless be considered a dangerous weapon when it is used in the commission of a robbery.[3] This new framework instructs that it is the trial court's responsibility to determine, as a matter of law, whether an object can be considered a dangerous or deadly weapon in all cases involving the charge of armed robbery.[4] By making the determination of dangerousness a question of law for the trial court, the court has essentially left the trier of fact with the single task of determining whether the criminal use of the dangerous weapon actually occurred as alleged by the State.[5] With its decision in *Handy*, the court has allocated decision-making responsibility of a primarily factual issue to the trial court without offering support or explanation and, in doing so, treads upon an area of criminal law traditionally reserved for juries.

1. The Case.—Harry Sparks, a letter carrier for the United States Postal Service, was delivering Social Security checks on October 3, 1996.[6] While on his mail route, Sparks was approached by the defendant, Mark Handy, in front of a residence at 134 North Edgewood Street in Baltimore, Maryland, who asked if he had any change of address cards.[7] Sparks told Handy that he did not have any change of address cards and that he usually did not carry them on his mail route.[8] Handy then passed Sparks and continued up the front staircase to residence number 134, blocking Sparks's access to the mailbox at the top of the stairs.[9] As Sparks tried to pass him, the defendant

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1. 357 Md. 685, 745 A.2d 1107 (2000).
2. *Id.* at 689, 745 A.2d at 1109.
3. *See infra* notes 74-104 and accompanying text (describing the *Handy* court's analysis of what constitutes a dangerous or deadly weapon).
4. *Handy*, 357 Md. at 694, 745 A.2d at 1111 ("It is for the trial court to determine initially, as a matter of law, whether an object can be considered a deadly or dangerous weapon under *any* of the *Brooks* categories." (emphasis added)).
5. *Id.*
6. *Id.* at 689, 745 A.2d at 1109.
7. *Id.*
8. *Id.*
9. *Id.*

sprayed him in the eyes with pepper spray.[10] Sparks tried to wrestle with Handy, but fell to the ground.[11] The defendant grabbed Sparks's mailbag, which contained several Social Security checks, and fled.[12] When police arrived on the scene, Sparks gave a description of the man who had robbed him.[13] Six months later, he picked Handy's picture out of a photo array and positively identified him as the assailant.[14]

At trial, the defendant moved for judgment of acquittal on the charge of robbery with a dangerous and deadly weapon, arguing that pepper spray was not a dangerous or deadly weapon under Maryland's armed robbery statute.[15] The trial judge denied the motion, and a jury convicted Handy of robbery with a dangerous or deadly weapon.[16]

Handy appealed his conviction to the Court of Special Appeals.[17] He argued that the evidence produced by the State at trial was insufficient to support his conviction because he had committed the robbery with pepper spray, and pepper spray fails to qualify as a dangerous or deadly weapon.[18] The Court of Special Appeals, however, upheld the conviction, concluding that pepper spray could qualify as a dangerous weapon under the analysis set forth by the Court of Appeals in *Brooks v. State*.[19] The Court of Special Appeals explained that mace or pepper spray could be considered a dangerous weapon under *Brooks* when

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 689-90, 745 A.2d at 1109.

14. *Id.* at 690, 745 A.2d at 1109.

15. *Id.* The Maryland Annotated Code provides that "[e]very person convicted of the crime of robbery or attempt to rob with a dangerous or deadly weapon or accessory thereto is guilty of a felony [and] shall . . . be sentenced to imprisonment for not more than 20 years." MD. ANN. CODE art. 27, § 488 (1996). Handy later renewed the motion for judgment of acquittal at the end of trial, and it was again denied. *Handy*, 357 Md. at 690, 745 A.2d at 1109.

16. *Handy*, 357 Md. at 690, 745 A.2d at 1109. Mark Handy was also convicted by the jury for simple robbery and for wearing and carrying a weapon openly with intent to injure. *Id.* at 688-89, 745 A.2d at 1108.

17. Handy v. State, 126 Md. App. 548, 730 A.2d 710 (1999).

18. *Id.* at 553, 730 A.2d at 712. Whether the trial court erred in denying the defendant's motion to suppress evidence of his identification as the robber was also presented for the court's review at the intermediate appellate level. *Id.* at 552-53, 730 A.2d at 712. The Court of Special Appeals concluded that there was no error in the trial court's denial of the defendant's motion to suppress. *Id.* This issue will not receive further discussion in this Note.

19. *Id.* at 553, 730 A.2d at 712 (discussing Brooks v. State, 314 Md. 585, 552 A.2d 872 (1989)); *see infra* note 67 (explaining the three categories of dangerous or deadly weapons established in *Brooks*). Before engaging in its own analysis under *Brooks*, the Court of Special Appeals noted that Maryland's appellate courts had not previously addressed the spe-

used as an "offensive weapon to injure and overcome the intended victim."[20] The intermediate appellate court reasoned that some objects that are not necessarily dangerous or deadly are capable of being used in a dangerous or deadly way when used during the commission of a robbery.[21] Continuing in this vein, the Court of Special Appeals explained that, when an object that is not *per se* deadly or dangerous is used to carry out a robbery, it is for the trier of fact to determine whether that object was in fact used in a dangerous way under the particular circumstances of the case.[22] The court concluded that pepper spray qualified as a dangerous weapon when used during the course of a robbery.[23] Accordingly, the Court of Special Appeals affirmed Handy's conviction and sentence for robbery with a dangerous or deadly weapon.[24] Handy appealed his conviction to the Court of Appeals, and the court granted certiorari to consider whether pepper spray qualified as a dangerous or deadly weapon under Maryland's armed robbery statute.[25]

2. *Legal Background.*—Maryland common law defines the crime of robbery as "the felonious taking and carrying away of the personal property of another from the victim's person by the use of violence or by putting the victim in fear."[26] Article 27, section 486 of the Maryland Annotated Code, Maryland's robbery statute, does not define the crime of robbery, but merely fixes a statutory penalty for the common-

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cific issue of whether pepper spray constitutes a dangerous or deadly weapon. *Handy*, 126 Md. App. at 553, 730 A.2d at 712.

20. *Handy*, 126 Md. App. at 553, 730 A.2d at 712.

21. *Id.* The court maintained that "[i]t is the use to which the object is put that determines whether a particular object is a dangerous or deadly weapon." *Id.* The court used a jump rope to illustrate this idea. *Id.* A jump rope, ordinarily, serves a completely benign purpose; however, it would rightfully be considered dangerous or deadly if it were used to hang someone. *Id.* Similarly, the Court of Special Appeals maintained that pepper spray is not a dangerous or deadly weapon *per se*, but that did not exclude the possibility that pepper spray could become a dangerous or deadly weapon under section 488 when it is used to blind and disable a person as it was in *Handy*. *Id.* at 555, 730 A.2d at 713.

22. *Id.* at 555, 730 A.2d at 713. The court held that "[w]hether an object that is not necessarily a dangerous weapon, but can be used as such, may be considered a dangerous weapon under the applicable statute is a question of fact to be resolved by the trier of fact." *Id.* The Court of Special Appeals maintained that since mace is not a *per se* dangerous or deadly weapon, and its dangerousness depends upon its use in furtherance of a robbery, the trial court "properly left for the jury to decide as a factual issue whether pepper spray was a dangerous or deadly weapon." *Id.* at 553, 730 A.2d at 712.

23. *Id.* at 555-56, 730 A.2d at 713-14.

24. *Id.* at 556, 730 A.2d at 714.

25. *Handy*, 357 Md. at 689, 745 A.2d at 1109.

26. Eldridge v. State, 329 Md. 307, 316, 619 A.2d 531, 535-36 (1993) (citing State v. Gover, 267 Md. 602, 606, 298 A.2d 378, 380-81 (1973) (articulating the common-law definition of simple robbery)).

law crime of robbery.[27] Similarly, under Article 27, section 488 of the Code, Maryland's armed robbery statute, robbery with a deadly or dangerous weapon is not treated as a "separate substantive offense;" section 488 merely provides a more severe punishment for the common-law crime of robbery when it is performed with a deadly or dangerous weapon.[28]

Handy is the most recent in a long line of cases in which Maryland courts have struggled with the determination of what constitutes a dangerous or deadly weapon for the purpose of proving the crime of armed robbery. There are two alternative approaches that Maryland courts have taken in determining what constitutes a dangerous or deadly weapon in the armed robbery context.[29] Initially, the court followed a subjective approach, emphasizing the degree of fear and intimidation the victim of the robbery experienced due to the assailant's use of a weapon.[30] However, with its opinion in *Brooks v. State*,[31] the court outlined a strictly objective approach, under which a finding

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27. Section 486 of the Maryland Annotated Code provides:

> Every person convicted of the crime of robbery or attempt to rob, or as accessory thereto before the fact, is guilty of a felony, shall restore the thing robbed or taken to the owner, or shall pay to him the full value thereof, and be sentenced to imprisonment for not more than 15 years.

MD. ANN. CODE art. 27, § 486 (1996).

28. Conyers v. State, 345 Md. 525, 558, 693 A.2d 781, 796-97 (1997); Whack v. State, 288 Md. 137, 140-41, 416 A.2d 265, 266 (1980). The *Whack* court explained that robbery in Maryland is a "single common law offense" and that sections 486 and 488 of the Annotated Code simply provide varying penalties for the crime of common-law robbery. *Whack*, 288 Md. at 140-41, 416 A.2d at 266. Section 488 of the Maryland Annotated Code provides:

> Every person convicted of the crime of robbery or attempt to rob with a dangerous or deadly weapon or accessory thereto is guilty of a felony, shall restore to the owner thereof the thing robbed or taken, or shall pay him the full value thereof, and be sentenced to imprisonment for not more than 20 years.

MD. ANN. CODE art. 27, § 488.

Maryland's armed robbery statute provides a more severe penalty for the common-law crime of robbery when the State can prove that a defendant used a dangerous or deadly weapon to commit the crime. *See Conyers*, 345 Md. at 558, 693 A.2d at 796-97. See *supra* note 27 for relevant portions of section 486 and a comparison of the statutory penalties.

29. *See infra* notes 33-47 and accompanying text (discussing the subjective approach that Maryland courts have applied to determine what constitutes a dangerous or deadly weapon in the context of armed robbery); *see also infra* notes 48-73 and accompanying text (discussing an objective approach to the question of what constitutes a dangerous or deadly weapon).

30. *See, e.g.*, Jackson v. State, 231 Md. 591, 593, 191 A.2d 432 (1963) (noting that the testimony offered at the trial level showed that the victims "believed the instrument to be an authentic pistol and [were] put in fear by it, and, thus coerced, complied with the robber's demand for . . . money."); Hayes v. State, 211 Md. 111, 115, 126 A.2d 576, 578 (1956) (maintaining that it is immaterial whether an object used in the commission of an armed robbery was actually dangerous so long as the victim believed that the object was dangerous and complied with the robber's demands as a result of that belief).

31. 314 Md. 585, 552 A.2d 872 (1989).

of dangerousness depends upon the character of the object and the way it was used during the commission of the robbery.[32]

a. Maryland's Subjective Approach to Determining Dangerousness in the Context of Armed Robbery.—In *Hayes v. State*,[33] the Court of Appeals considered whether an unloaded pistol was a dangerous or deadly weapon within the meaning of Maryland's armed robbery statute.[34] This issue had not yet been addressed by the Court of Appeals in the armed robbery context.[35] The defendant had been convicted of attempted robbery with a dangerous weapon in the Criminal Court of Baltimore City by a judge sitting without a jury.[36] The defendant argued that his conviction for armed robbery could not be sustained because the evidence indicated that the pistol was unloaded, and an unloaded pistol is not dangerous or deadly.[37] The Court of Appeals ultimately rejected the defendant's argument, noting that an unloaded pistol could be used to strike or beat a victim of a robbery and could be loaded "within a matter of seconds."[38] Moreover, the court

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32. *Id.* at 590, 552 A.2d at 875. The court contrasted the subjective approach previously followed with an objective analysis that it ultimately adopted, in which "to be deadly or dangerous a weapon must be inherently of that character or must be used or useable in a manner that gives it that character." *Id.*

33. 211 Md. 111, 126 A.2d 576 (1956).

34. *Id.* at 112, 126 A.2d at 577.

35. *Id.* at 113, 126 A.2d at 577.

36. *Id.* at 112, 126 A.2d at 576-77. In defense of the trial judge's verdict, the Court of Appeals explained in dicta that

> "[w]hether a particular weapon is a deadly or dangerous one is generally a question of law. Sometimes, owing to the equivocal character of the instrument—as a belaying pin—or the manner and circumstances of its use, the question becomes one of law and fact, to be determined by the jury under the direction of the court. But where it is practicable for the court to declare a particular weapon dangerous or not, it is its duty to do so. A dangerous weapon is one likely to produce death or great bodily injury. A loaded pistol is not only a dangerous but a deadly weapon. The prime purpose of its construction and use is to endanger and destroy life. This is a fact of such general notoriety that the court must take notice of it."

Id. at 114, 126 A.2d at 577 (quoting United States v. Williams, 2 F. 61, 64 (C.C.D. Or. 1880)). Essentially, the court instructed that when an object of equivocal character, which is not *per se* dangerous or deadly, is used in the commission of a robbery, then it is for the trier of fact to determine whether that object was used in a dangerous manner. *See id.*

37. *Id.* at 112, 126 A.2d at 577.

38. *Id.* at 114-15, 126 A.2d at 578. Although the *Hayes* court primarily focused upon the degree to which the victim of the robbery was "intimidated" (an analysis that is consistent with a subjective approach to the dangerous or deadly weapons issue), the court also provided an alternative, objective rationale for concluding that an unloaded pistol is a deadly or dangerous weapon. *See id.* at 114, 126 A.2d at 588. The court explained in *Hayes* that when a gun is used during the commission of a robbery, it is immaterial whether it is loaded or unloaded, because it is capable of causing harm in either instance. *Id.* at 114-15, 126 A.2d at 588. The court explained that "[a] dangerous weapon is one likely to produce

maintained that, ultimately, it was immaterial whether the gun used during the commission of the crime was loaded or unloaded, because guilt under Maryland's armed robbery statute depended only upon a finding of the intention to rob another by intimidation through the use of a weapon.[39]

Seven years later, in *Jackson v. State*,[40] the Court of Appeals reaffirmed its commitment to the subjective test for evaluating whether an object qualified as a dangerous weapon.[41] In *Jackson*, the court considered whether a twenty-two caliber starter's pistol, similar in appearance to a regular pistol, was a dangerous weapon.[42] The court noted that the evidence adduced at trial showed that both victims of the robbery believed that the starter's pistol was an authentic gun, were "put in fear by it," and were consequently compelled to comply with the robber's demands for money.[43] The court relied on the rationale in *Hayes* to determine whether a starter's pistol, incapable of firing a bullet, was a dangerous or deadly weapon.[44] The Court of Appeals concluded that the pistol was dangerous and explained that "'[s]o long as there is an intent to rob by that means [intimidation induced by the weapon], it is unnecessary to find an intent or ability to execute the implied threat in the event of resistance.'"[45]

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death or great bodily injury." *Id.* at 114, 126 A.2d at 588. This language is consistent with the objective analysis that was ultimately adopted by the court thirty years later in *Brooks*. *See* Brooks v. State, 314 Md. 585, 600, 552 A.2d 872, 880 (1989). The court's opinion in *Hayes*, at least implicitly, provides two alternative rationales, one subjective and one objective, for finding that an unloaded pistol was a deadly or dangerous weapon. *Hayes*, 211 Md. at 114-15, 126 A.2d at 578. The court's use of these alternative rationales in *Hayes* contributed to the atmosphere of confusion surrounding the dangerous weapons issue prior to the court's decision in *Brooks*.

39. *Hayes*, 211 Md. at 115, 126 A.2d at 578. The *Hayes* court explained that Maryland's robbery statute

> [p]redicates the greater penalty attached to the use of a dangerous or deadly weapon upon the means employed in the intimidation. So long as there is an intent to rob by that means, it is unnecessary to find an intent or ability to execute the implied threat in the event of resistance.

Id. (citations omitted). Under *Hayes*, it is inconsequential whether the object used to commit the armed robbery was actually dangerous, so long as the victim believed that it was dangerous and was thus coerced into complying with the robber's demands. *See id.*

40. 231 Md. 591, 191 A.2d 432 (1963).

41. *Id.* at 594, 191 A.2d at 433.

42. *Id.* at 593, 191 A.2d at 432. Lucius Jackson was convicted of armed robbery by a trial judge sitting without a jury, and he appealed his conviction. *Id.*

43. *Id.*

44. *Id.* at 594, 191 A.2d at 433. Relying upon its analysis in *Hayes*, the court noted that "[g]uilt under the Maryland statute is predicated upon a finding of intent to rob by means of *intimidation* produced by the use of a weapon, coupled with the *apparent* ability to execute the implied threat to use the weapon if resistance is offered." *Id.*

45. *Id.* (quoting Hayes v. State, 211 Md. 111, 115, 126 A.2d 576, 578 (1956)).

In both *Hayes* and *Jackson*, the court maintained that it is inconsequential whether the weapon used during the commission of a robbery was *actually* capable of inflicting harm on a victim, so long as the robber possessed the apparent ability to inflict such harm and thus intimidated the victim into compliance.[46] The subjective approach, formulated in *Hayes* and followed in *Jackson*, allowed the State to meet this burden by demonstrating that the victim of the robbery believed that the weapon used was dangerous and consequently was intimidated by its use.[47]

b. Maryland Courts Take an Objective Approach to Determining What Constitutes a Dangerous Weapon in the Context of Armed Robbery.— Just one year after *Jackson* was decided, the Court of Appeals, in *Bennett v. State*,[48] retreated from a purely subjective approach for assessing the dangerousness of an object used in the commission of a robbery.[49] In *Bennett*, the court integrated the objective consideration of whether a weapon should be considered dangerous or deadly with the subjective inquiry established in *Hayes* and its progeny.[50] In *Bennett*, the court again considered whether the victim of a robbery was intimi-

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46. *See supra* notes 39 & 44 (discussing the subjective analysis applied by the Court of Appeals in both *Hayes* and *Jackson*).

47. *See Jackson*, 231 Md. at 594, 191 A.2d at 433; *Hayes*, 211 Md. at 115, 126 A.2d at 578. In between its consideration of *Hayes* and *Jackson*, the Court of Appeals revisited the dangerous weapons issue in the armed robbery context on two occasions. In *Vincent v. State*, 220 Md. 232, 151 A.2d 898 (1959), the court sustained a conviction for armed robbery where the defendant and his accomplices used both a toy gun and a real automatic pistol. *Id.* at 237-38, 151 A.2d at 901-02. In *Vincent*, the court seemed to take an objective approach to the question of dangerousness, noting that "it is necessary under the statute for the state to show that the weapon used was . . . either dangerous . . . or deadly; but here there was ample evidence for the trier of facts to conclude that a real pistol was used." *Id.* However, in *Davis v. State*, 225 Md. 45, 168 A.2d 884 (1961), the court once again returned to a subjective approach to armed robbery cases. In *Davis*, the court maintained that it is not necessary for the State to prove that the gun was loaded. *Id.* at 46, 168 A.2d at 885. The court noted "it is enough if it is shown . . . that the gun was employed in a threatening fashion." *Id.* The court's shift back and forth between a subjective and objective approach caused a great deal of confusion. *See infra* note 60.

48. 237 Md. 212, 205 A.2d 393 (1964).

49. *See id.* at 214-16, 205 A.2d at 394-95; *infra* note 50 (discussing the commingling of a subjective and objective analysis in the court's disposition of *Bennett*); *see also supra* note 38 (explaining the subjective approach to determining what constitutes a dangerous or deadly weapon in the context of armed robbery).

50. *Bennett*, 237 Md. at 214-16, 205 A.2d at 394-95. The court's disposition of the dangerous weapon issue in *Bennett* mingles subjective elements with a predominantly objective analysis of the dangerous weapons inquiry. *Id.* Victim intimidation, the hallmark of the court's subjective approach to the dangerous weapon issue, was evidenced in *Bennett* by the fact that the victim taxicab driver was "put in fear by the cord twisted about his neck." *Id.* at 216, 205 A.2d at 395. Ultimately, however, the court's conclusions were predominantly supported by its objective finding that the defendants' use of the microphone cord to

dated by the defendant's use of a microphone cord as a weapon.[51] While retaining a subjective component to its analysis, the court simultaneously made an objective determination as to whether the weapon used during the robbery was dangerous by examining the manner in which it was used.[52]

In *Bennett*, the trial judge, sitting without a jury, convicted both defendants of robbery with a dangerous and deadly weapon.[53] The defendants appealed their conviction, arguing that the verdict was clearly erroneous because the microphone cord could not be a dangerous or deadly weapon.[54] However, the Court of Appeals ultimately rejected the defendants' argument, finding that the victim cab driver was placed in fear when the microphone cord was wrapped around his neck.[55] Additionally, the court maintained that the trial court was justified in finding that the manner of use of the microphone cord produced bodily harm and consequently qualified it as a dangerous weapon.[56] In affirming the defendants' convictions, the court accounted for the victim's subjective beliefs, noting that the cab driver was put in fear by the microphone cord wrapped around his neck during the robbery; however, the court integrated an objective component into its approach to the dangerous weapons issue by considering the nature of the weapon used to commit the robbery, and its actual potential to cause harm.[57]

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strangle the cab driver constituted the use of a dangerous weapon in the commission of a robbery. *Id.*

51. *Id.* at 214, 205 A.2d at 394.

52. *Id.* at 216, 205 A.2d at 395.

53. *Id.*

54. *Id.* at 214, 205 A.2d at 394.

55. *Id.* at 216, 205 A.2d at 395.

56. *Id.*

57. *Id.* at 214-15, 205 A.2d at 394 (explaining that a weapon "'is generally defined as anything used or designed to be used in destroying, defeating, or injuring an enemy, or as an instrument of offensive or defensive combat'" (quoting 3 WHARTON'S CRIMINAL LAW AND PROCEDURE § 961, at 111 (Anderson's ed., 1957))). The court likewise described, in general terms, weapons which would qualify as a "dangerous weapon" under the armed robbery statute:

> The character of a weapon as a deadly or dangerous weapon is not necessarily determined by its design, construction, or purpose. A weapon may be deadly or dangerous although not especially designed or constructed for offensive or defensive purposes or for the destruction of life or the infliction of bodily injury. Accordingly, when a weapon is in fact used in such a way as is likely to produce death or grievous bodily harm it may be properly regarded as a dangerous or deadly weapon.

Id. at 215, 205 A.2d at 394 (quoting 3 WHARTON'S, *supra*, at 113). The court noted that some weapons may be dangerous by design, such as a knife or a gun. *Id.* at 214-15, 205 A.2d at 394. However, some objects, even though "ordinarily innocuous," can be classified as dangerous or deadly weapons when they are used in a dangerous or deadly way. *Id.*

The Court of Appeals also noted that the trier of fact has often been permitted to determine whether an "ordinarily innocuous object," such as a rope, qualifies as a dangerous weapon under an armed robbery statute, due to the manner in which it was used during the commission of a robbery.[58] The court's recognition of this precedent was nothing new. In *Hayes*, the Court of Appeals similarly noted that when an object that serves a perfectly benign purpose is used in a dangerous or deadly way, the issue of whether the object is dangerous is a question of "law and fact, to be determined by the jury under the direction of the court."[59]

The next significant case in the Maryland court's endeavor to bring clarity to the "dangerous weapons" issue in armed robbery cases came in 1989 in *Brooks v. State*.[60] In *Brooks*, the Court of Appeals considered whether a plastic toy pistol was a dangerous or deadly weapon within the contemplation of Maryland's armed robbery statute.[61] The defendant had been convicted by a jury of armed robbery in holding

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Under such circumstances, the determination that an "ordinarily innocuous" object is a dangerous weapon because of the manner in which it was used is a question that the trier of fact has been permitted to find. *Id.* The way the microphone cord was used by the defendants in *Bennett* constituted the use of a dangerous weapon in the commission of a robbery. *Id.* at 216, 205 A.2d at 395.

58. *Id.* at 215, 205 A.2d at 394 (citing State v. Calhoun, 34 N.W. 194, 196 (Iowa 1887)). In *Calhoun*, the defendant was charged with armed robbery because he used a length of rope to tie the feet and hands of the individual he robbed. *Calhoun*, 34 N.W. at 195. The Supreme Court of Iowa held that the trial court had properly instructed the jury that it was for them to decide whether the cord was a "dangerous weapon." *Id.* at 196.

59. Hayes v. State, 211 Md. 111, 114, 126 A.2d 576, 577 (1956) (quoting United States v. Williams, 2 F. 61, 64 (C.C.D. Or. 1880)).

60. 314 Md. 585, 552 A.2d 872 (1989). Less than three months after *Bennett* was decided, the Court of Appeals again addressed the issue of robbery with a deadly or dangerous weapon in *Myers v. State*, 237 Md. 632, 206 A.2d 704 (1965). Despite the court's holding in *Bennett*, the court's opinion in *Myers* revolved around a strictly subjective analysis of the dangerous weapons issue in the armed robbery context. *Id.* at 634, 206 A.2d at 705 (holding that a loaded gun, incapable of being fired, was used as a deadly weapon for the purpose of proving the crime of armed robbery). Citing *Hayes* and *Jackson*, the court found that there was an "intent to rob by means of intimidation produced by the use of a weapon . . . . A secret intention of the appellant not to perform the threatened act or even his undisclosed inability to perform it would be immaterial." *Id.* (citing Jackson v. State, 231 Md. 591, 191 A.2d 432 (1963); Hayes v. State, 211 Md. 111, 126 A.2d 576 (1956)). The progression of cases from *Hayes* to *Myers* fails to offer one clear standard for Maryland's lower courts to follow in addressing the dangerous weapons issue in the context of armed robbery. This state of confusion was the legal context surrounding the court's decision in *Brooks*, and the reason for the court's comment that "Maryland case law . . . gives us somewhat imprecise marching orders" for considering whether a particular instrument is dangerous under section 488 of the Maryland Annotated Code. *Brooks*, 314 Md. at 594, 552 A.2d at 877.

61. *Brooks*, 314 Md. at 586, 552 A.2d at 873.

up a Fotomat store.[62] Brooks appealed, arguing that a plastic toy gun is neither deadly nor dangerous.[63] The Court of Appeals ultimately agreed with the defendant, holding that the evidence was "insufficient to establish that a lightweight toy plastic pistol was a deadly or dangerous weapon" under Maryland's armed robbery statute.[64]

The court conceded that due to the commingling of subjective and objective components, Maryland's case law failed to provide a clear standard for determining whether an object is a dangerous weapon.[65] In response to the confusion over whether a subjective or objective approach should be applied, the *Brooks* court distilled and integrated three objective tests for determining whether an object was dangerous, only one of which must be satisfied for an instrument to qualify under Maryland's armed robbery statute.[66] Essentially, for an object to be deadly or dangerous, it must be either *inherently* dangerous, such as a gun or a knife; *useable* in a dangerous manner; or actually *used* in a way that is likely to inflict harm upon the victim.[67] The court reached this conclusion through an analysis of the legislative history of Maryland's armed robbery statute.[68] The court concluded that "the legislative purpose in prescribing an enhanced penalty for armed robbery was aimed at deterring those capable of *actually* inflicting death or serious bodily injury. The use of a toy gun 'adds nothing extra to the bare fact that [the robber] intimidated the victim.'"[69] The court explained that the adoption of a strictly objective test was consistent with the legislature's intent in enacting section 488

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62. *Id.* at 586-87, 552 A.2d at 873-74.

63. *Id.* at 587, 552 A.2d at 874. Brooks also asserted that the trial court's jury instructions were erroneous because they allowed the jury to convict if they "found the victim believed the weapon was real and was intimidated thereby." *Id.*

64. *Id.* at 586, 552 A.2d at 873.

65. *Id.* at 590, 552 A.2d at 874.

66. *See id.* at 600, 552 A.2d at 880.

67. *Id.* In *Brooks*, the court outlined three objective factors for determining whether an object qualifies as a dangerous weapon:

> [T]he instrument must be (1) designed as "anything used or designed to be used in destroying, defeating, or injuring an enemy, or as an instrument of offensive or defensive combat"; (2) under the circumstances of the case, immediately useable to inflict serious or deadly harm (*e.g.*, unloaded gun or starter's pistol useable as a bludgeon); or (3) actually used in a way likely to inflict that sort of harm (*e.g.*, microphone cord used as a garrote).

Id. (citations omitted). The court maintained that an object qualifies as a dangerous or deadly weapon under section 488 if it falls within any of these three objectively dangerous categories. *Id.*

68. *See id.* at 596-98, 552 A.2d at 878-79 (discussing the legislative history of section 488).

69. *Id.* at 598, 552 A.2d at 879 (emphasis added) (citations omitted).

of the Maryland Annotated Code.[70] Moreover, the objective test for determining what constitutes a dangerous weapon precludes "absurd results," such as convicting an individual of armed robbery when a defendant merely gives the impression that he is armed with a gun by sticking his finger in his pocket, and thereby intimidating his victim to comply with his demands.[71] Accordingly, the court concluded that a lightweight, plastic toy gun did not qualify as a dangerous or deadly weapon under any of the three objective factors the court articulated and reversed the defendant's conviction for armed robbery.[72]

Thus, according to Maryland law, for an instrument to qualify as a deadly or dangerous weapon, it must fit within one of the three categories of weapons outlined in *Brooks*.[73]

3. The Court's Reasoning.—In *Handy*, the Court of Appeals unanimously held that pepper spray or mace may be considered a dangerous or deadly weapon when used during an armed robbery.[74] The court concluded that pepper spray could qualify as such a weapon under any of the three categories of dangerous weapons set forth in *Brooks*.[75] In arriving at this determination, the court concluded that, in any given case, it is for the trial court to determine, as a matter of law, "whether it is possible for an object to be used as a deadly or

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70. *Id.* The court noted that the crime of armed robbery is not a separate substantive offense, but rather is the same crime as common-law robbery "aggravated by use of a dangerous or deadly weapon." *Id.* The legislature's intention in enacting section 488 was to deter those *actually* capable of inflicting injury on their victims, and had nothing to do with mere intimidation. *Id.*

71. *Id.* at 598-99, 552 A.2d at 879; *see also* Samuel Lyles Freeland, Note, *Unloaded Pistol as a Dangerous Weapon Within the Robbery Statute*, 17 MD. L. REV. 257, 261 (1957) (arguing that the subjective analysis applied by the court in *Hayes* had the likely effect of producing such "absurd results" as convicting an individual of armed robbery when he sticks his finger in his pocket and pretends to be armed with a gun).

72. *Brooks*, 314 Md. at 600-01, 552 A.2d at 880. The court concluded that the toy gun used by Brooks did not qualify as a dangerous or deadly weapon. The toy gun was not "'used or designed to be used in destroying, defeating, or injuring an enemy'" and therefore did not qualify as a dangerous or deadly weapon under the first category. *See id.* (citing Bennett v. State, 237 Md. 212, 214-15, 205 A.2d 393, 394 (1964)). The court similarly concluded that the toy gun was not of sufficient weight or heaviness to be "immediately useable to inflict serious or deadly harm" and, therefore, did not fall within the second category of dangerous or deadly weapons. *Id.* Finally, the court determined that the toy gun was not "*actually* used in a way likely to inflict . . . harm," because Brooks only displayed the butt of the gun to his victim while it was in his waistband; consequently, it did not fall within the third category. *Id.* (emphasis added).

73. *Id.* at 600, 552 A.2d 880.

74. *Handy*, 357 Md. at 689, 745 A.2d at 1109.

75. *Id.* at 696, 745 A.2d at 1113; *see supra* note 67 and accompanying text (discussing the three objective tests for evaluating whether an object is dangerous or deadly for the purpose of armed robbery).

dangerous weapon and whether its use in a particular way constitutes the use of a dangerous or deadly weapon in the commission of a criminal offense."[76] The court explained that the trier of fact's only responsibility is to determine whether the facts alleged by the State were actually proven.[77] Because the jury found that Mark Handy actually used pepper spray in the commission of a robbery, the Court of Appeals affirmed Handy's conviction for robbery with a dangerous or deadly weapon.[78]

a. Treatment of Pepper Spray as a Dangerous or Deadly Weapon Under a Brooks *Analysis.*—Writing for the court, Judge Cathell began the opinion with a discussion of whether pepper spray constitutes a dangerous or deadly weapon.[79] Judge Cathell employed the objective methodology used by the court in *Brooks* for evaluating the dangerousness of a weapon[80] and held that pepper spray could be classified as dangerous or deadly under any of the three categories.[81] The court also explained that the trial court generally should determine, as a matter of law, whether an object should be considered a dangerous or deadly weapon under any of the *Brooks* categories.[82] If the trial court concludes that the object in question fits into any of the *Brooks* categories, then the trier of fact is left only to determine whether "the criminal use of a deadly or dangerous weapon actually occurred."[83]

Handy argued that pepper spray did not fit into the first category of dangerous and deadly weapons under *Brooks.*[84] He asserted that the temporary blinding of a person with pepper spray did not constitute serious or deadly injury, and, therefore, the pepper spray could not constitute a dangerous or deadly weapon under the first category.[85] Although the Court of Appeals had never addressed the issue of whether pepper spray was a dangerous weapon under the first category, Judge Cathell noted that most jurisdictions addressing the issue

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76. *Handy*, 357 Md. at 690, 745 A.2d at 1109-10.
77. *Id.* at 690-91, 745 A.2d at 1110.
78. *Id.* at 691, 745 A.2d at 1110.
79. *Id.* at 688, 745 A.2d at 1109.
80. *Id.* at 693, 745 A.2d at 1111.
81. *Id.* at 696, 745 A.2d at 1113.
82. *Id.* at 694, 745 A.2d at 1111.
83. *Id.*
84. *Id.* at 696, 745 A.2d at 1113. The defendant asserted that pepper spray is not "used or designed to be used in destroying, defeating, or injuring an enemy, or as an instrument of offensive or defensive combat." *Id.* (quoting Brooks v. State, 314 Md. 585, 600, 552 A.2d 872, 880 (1989)). Rather, the defendant argued that pepper spray is designed to "temporarily disable" an individual and is not designed to cause "serious bodily injury or death." *Id.*
85. *Id.*

have held that pepper spray is a dangerous weapon when it is used during the commission of a robbery.[86] The court ultimately agreed with the bottom-line holding reached in such jurisdictions.[87]

The court also explained that in Maryland, as a matter of law, when "an object or substance can be used as a deadly or dangerous weapon, the potential for bodily harm suffices, regardless of the extent of resulting harm in an actual case."[88] The court maintained that if an individual attempts to use pepper spray and misses the respiratory system or eyes, but nevertheless completes the robbery, or attempts to do so, he or she has committed robbery with a deadly or dangerous weapon, regardless of whether the robber was successful in inflicting any serious physical injury upon the victim.[89]

The Court of Appeals continued with its application of the *Brooks* factors, considering the use of pepper spray under the second and

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86. *Id.* at 696-99, 745 A.2d at 1113-14. The court cited *United States v. Neill*, 166 F.3d 943, 949-50 (9th Cir.), *cert. denied*, 526 U.S. 1153 (1999) (holding that the use of pepper spray during a bank robbery warranted an increased sentence under the federal sentencing guidelines because the pepper spray caused "extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty" and, therefore, constituted the use of a dangerous or deadly weapon (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. 1(j)(1997))); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999) (holding that spraying mace on the victims of an attempted robbery was sufficient to increase the sentence for use of a dangerous weapon because it caused "serious bodily harm" to the victims); *United States v. Taylor*, 135 F.3d 478, 481-82 (7th Cir. 1998) (holding that the use of pepper spray during an armed robbery was sufficient justification for increasing a sentence under the federal sentencing guidelines because it caused "bodily harm" to the victims of the robbery); *United States v. Dukovich*, 11 F.3d 140, 142 (11th Cir. 1994), *cert. denied*, 511 U.S. 1111 (1994) (agreeing that tear gas constitutes a dangerous weapon for sentencing purposes when the defendant sprayed tear gas in the air during the course of a bank robbery); *People v. Norris*, 600 N.W.2d 658, 660, 662-63 (Mich. Ct. App. 1999) (holding that "extreme eye pain and irritation, burning sensations on the skin and in the nose, mouth and lungs, and breathing difficulties," resulting from the use of a tear gas and pepper spray mixture during a robbery "was sufficient to permit a reasonable jury to conclude that the tear gas mixture was a 'dangerous weapon' within the meaning of the armed robbery statute"); and *Pitts v. State*, 649 P.2d 788, 791 (Okla. Crim. App. 1982) (holding that a can of mace could qualify as a dangerous weapon under Oklahoma's aggravated robbery statute when it was used to threaten the victim of a robbery).

87. *Handy*, 357 Md. at 699, 745 A.2d at 1114.

88. *Id.*

89. *Id.* In *Handy*, the court turned to other jurisdictions to support the holding that mace is a deadly or dangerous weapon when it caused serious physical harm in the instances in which it was used during a robbery. *See supra* note 86. Maryland's Court of Appeals expands upon this bottom line holding in *Handy* by noting that pepper spray qualifies as a dangerous or deadly weapon because of its *potential* to cause harm. *Handy*, 357 Md. at 699, 745 A.2d at 1114. Therefore, even when a person merely threatens to use pepper spray in furtherance of a robbery, he has committed robbery with a dangerous or deadly weapon. *Id.*

third categories.[90] The defendant argued that the pepper spray was not a dangerous weapon under the second and third *Brooks* categories because the effect of the spray did not cause "serious physical harm" to the victim as defined by Article 27, section 12(c) of the Maryland Annotated Code.[91] The court, however, reached a different conclusion. Without addressing whether the definition of "serious physical injury" even applied outside the context of assault, the court rejected the defendant's argument, concluding that the use of pepper spray in the commission of the robbery caused the victim to suffer protracted loss or impairment of his eyesight, blinding him for several hours.[92] The court concluded that this was legally sufficient evidence that the pepper spray was used as a dangerous or deadly weapon under either the second or third *Brooks* factors.[93] In arriving at this determination, the court noted that other jurisdictions have found that pepper spray was used as a dangerous weapon when the victims received injuries similar to the injuries endured by Sparks, the victim in *Handy*.[94]

b. Whether the Legislature Intended to Exclude Pepper Spray from Being Treated as a Dangerous Weapon.—In affirming Handy's conviction, the court also reasoned that the legislative history of Article 27, section 36 of the Maryland Annotated Code refuted the defendant's contention that pepper spray is not a dangerous weapon.[95] Handy

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90. *Id.* at 699-700, 745 A.2d at 1114-15. The second *Brooks* category asks whether, under the circumstances of the case, the weapon was immediately useable to inflict serious or deadly harm. Brooks v. State, 314 Md. 585, 600, 552 A.2d 872, 880 (1989). The third *Brooks* category asks whether an instrument was actually used in a way likely to inflict that sort of harm. *Id.*

91. *Handy*, 357 Md. at 699-700, 745 A.2d at 1114-15. Article 27, section 12(c) of the Maryland Annotated Code defines "serious physical injury" for assault as:

> (c) *Serious physical injury.*—"Serious physical injury" means physical injury which:
> (1) Creates a substantial risk of death;
> (2) Causes serious permanent or serious protracted disfigurement;
> (3) Causes serious permanent or serious protracted loss of the function of any bodily member or organ; or
> (4) Causes serious permanent or serious protracted impairment of the function of any bodily member or organ.

MD. ANN. CODE art. 27, § 12(c) (1996).

92. *Handy*, 357 Md. at 700, 745 A.2d at 1115.

93. *Id.* at 701, 745 A.2d at 1115.

94. *Id.* at 702-03, 745 A.2d at 1116; *see supra* note 86 (discussing cases in other jurisdictions which have found mace or pepper spray to be a deadly or dangerous weapon when used during the commission of an armed robbery).

95. *Handy*, 357 Md. at 703, 745 A.2d at 1116. The defendant noted in his brief that in *Brooks*, the court looked to section 36 for guidance as to what sort of "implements the legislature believed to be dangerous or deadly weapons" for the purposes of interpreting section 488. *See* Brooks v. State, 314 Md. 585, 599, 552 A.2d 872, 880 (1989). Section 36(a) provides in relevant part:

maintained that pepper spray is not a dangerous or deadly weapon because it is not specifically named in the list of weapons in section 36(a)(1)—the section that enumerates those weapons which may not be worn or carried in a concealed manner because of their dangerous character.[96] Handy argued that the first clause of section 36(a)(1) lists all of the weapons that the legislature intended to treat as deadly or dangerous *per se*.[97] Handy claimed that because "chemical mace, pepper mace, or tear gas device[s]" are not specifically included in that list, they are not *per se* deadly or dangerous weapons.[98] Handy further argued the fact that "chemical mace, pepper mace, or tear gas device[s]" only appear in the second clause, which prohibits open possession with intent to injure is evidence that the legislature did not intend to treat these instruments as per se dangerous or deadly.[99]

The court, however, was not persuaded by Handy's argument, and maintained that the placement of chemical mace, pepper mace, and tear gas in the second clause of the statute did not mean that those weapons can *never* be used in a deadly or dangerous manner.[100] The court explained that pepper spray was not included in the first clause of section 36(a)(1) because the legislature "did not want to make it illegal for citizens to protect themselves from criminals by wearing or carrying mace, tear gas, or pepper spray in a concealed fashion."[101] Pepper spray was, however, included in the second clause of section 36(a)(1), which prohibits open possession with an intent to injure, because the legislature wanted to prevent an individual from possessing and using pepper spray or mace as an "offensive weapon, particularly in the robbery context."[102] The court concluded that the

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> Every person who shall wear or carry any dirk knife, bowie knife, switchblade knife, star knife, sandclub, metal knuckles, razor, nunchaku, or any other dangerous or deadly weapon of any kind, whatsoever (penknives without switchblade and handguns, excepted) concealed upon or about his person, and every person who shall wear or carry any such weapon, *chemical mace, pepper mace, or tear gas device* openly with the intent or purpose of injuring any person in any unlawful manner . . . .

MD. ANN. CODE art. 27, § 36(a)(1) (emphasis added).

96. *Handy*, 357 Md. at 703, 745 A.2d at 1116 (referring to MD. ANN. CODE art. 27, § 36(a)(1)).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 703, 745 A.2d at 1116-17. As the court noted previously, whether an object is capable of being used as a dangerous weapon, and whether an object used in a particular way would constitute a dangerous weapon is a matter of law for the trial court to determine. *Id.* at 703-04, 745 A.2d at 1117.

101. *Id.* at 706, 745 A.2d at 1118.

102. *Id.* at 705-06, 745 A.2d at 1118. In discussing the legislative history of Article 27, section 36(a)(1), the court commented on several letters in the Senate Bill file. *Id.* The

construction of section 36(a)(1) reveals the legislature's intent to prevent the prosecution of citizens who carry pepper spray for defensive purposes.[103]

The court ultimately rejected Handy's arguments that pepper spray fails to qualify as a dangerous or deadly weapon under Article 27, section 36(a)(1), and under any of the three *Brooks* categories.[104]

4. Analysis.—In *Handy v. State*, the Court of Appeals held that the use of pepper spray in the commission of a robbery constituted robbery with a dangerous or deadly weapon as a matter of law,[105] and in reaching this holding, the court laid out a new approach to address whether an object can be considered a dangerous or deadly weapon under Maryland's armed robbery statute.[106] The court declared that it is the responsibility of the trial court to determine whether an object can be considered a deadly or dangerous weapon.[107] If the trial court determines that an object is or is capable of being a deadly weapon within the meaning of the armed robbery statute, then the trier of fact's sole responsibility is to determine whether the criminal use of a deadly weapon actually occurred.[108] This new procedural framework for addressing the dangerousness of a weapon in the context of armed robbery marks a distinct departure from prior Maryland case law[109]

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court made note of the fact that the initiative to add mace and tear gas to section 36(a)(1) of the Code was assumed in response to a letter from Lieutenant Richard Shores of the Salisbury Police Department to Maryland Senator Joseph Long. *Id.* In this letter, Lieutenant Shores complained of the fact that a robber who had used pepper spray to commit a robbery was not charged with armed robbery under section 488 of the Code. *Id.* Another letter, from the Attorney General's office to Senator Long, indicated that section 36(a)(1) was intended to make it illegal to use tear gas devices as an offensive weapon. *Id.* at 706, 745 A.2d at 1118. This letter likewise noted that the defensive use of mace or tear gas was most likely excepted from coverage. *Id.* Based upon these letters, the *Handy* court concluded that the legislature had intended to prevent private citizens from using tear gas devices as offensive weapons, and did not intend to criminalize the defensive use of mace, or to make it illegal for a citizen to carry mace for his or her own protection. *Id.*

103. *Id.* at 707, 745 A.2d at 1118-19.

104. *Id.* at 696, 699, 701, 745 A.2d at 1113, 1115.

105. *Id.* at 690, 745 A.2d at 1110.

106. *Id.*, 745 A.2d at 1110-11 (referring to MD. ANN. CODE art. 27, § 488 (1996)).

107. *Id.* at 694, 745 A.2d at 1111.

108. *Id.*

109. *See, e.g.*, Anderson v. State, 328 Md. 426, 438, 614 A.2d 963, 968 (1992) (recognizing that before a defendant can be convicted under section 36(a) of the Maryland Code, for the concealed wearing and carrying of an object which has not been labeled by the legislature as dangerous or deadly *per se*, the trier of fact must determine whether the object constitutes a dangerous or deadly weapon); Hayes v. State, 211 Md. 111, 114, 126 A.2d 576, 577 (1956) (noting that it is for the jury to determine, under the direction of the court, whether an object of "equivocal character" constitutes a dangerous or deadly weapon due to the manner in which it was used); Wright v. State, 72 Md. App. 215, 221,

and the practices observed in most other jurisdictions.[110] Traditionally, when an object that is not dangerous or deadly *per se* is used during a robbery, it is the responsibility of the trier of fact to determine whether the object qualifies as a dangerous or deadly weapon.[111] The

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528 A.2d 498, 501 (1987) (implying that in many instances, the determination of what constitutes a dangerous weapon is a question reserved for the trier of fact).

110. *See, e.g.*, United States v. Sturgis, 48 F.3d 784, 788 (4th Cir. 1995) ("[W]hether a particular object was used as a dangerous weapon is not so mechanical that it can be readily reduced to a question of law. Rather, it must be left to the jury to determine"); United States v. Riggins, 40 F.3d 1055, 1057 (9th Cir. 1994) (stating that "what constitutes a dangerous weapon in a particular case is a question of fact for the jury"); United States v. Schoenborn, 4 F.3d 1424, 1433 (7th Cir. 1993) ("Whether or not an object constitutes a dangerous weapon . . . is a question of fact and necessarily depends on the particular circumstances of each case."); People v. Davis, 49 Cal. Rptr. 2d 890, 898 (Cal. Ct. App. 1996) (finding that objects which are not "weapons in the strict sense," but which may be used as weapons in the commission of a robbery, raise a question of fact to be determined by the trier of fact in each case); Gooch v. State, 652 So. 2d 1189, 1190-91 (Fla. Dist. Ct. App. 1995) (per curiam) (noting that whether an air-powered gun was a deadly weapon was a question for the jury and depended upon the way in which it had been used); People v. Elliott, 702 N.E.2d 643, 647 (Ill. App. Ct. 1998) (recognizing that when the dangerousness of a weapon depends on the manner in which it was used, then it is for the jury to determine whether it is dangerous or deadly under the circumstances of the case); State v. Bafford, 879 P.2d 613, 620 (Kan. 1994) ("Whether a weapon is a dangerous one in the context of an aggravated robbery charge is a fact question for the jury to decide."); Commonwealth v. Tarrant, 326 N.E.2d 710, 714 (Mass. 1975) (maintaining that when the object is not *per se* dangerous or deadly, it is a question of fact for the jury to determine "whether the circumstances surrounding the presence of the instrumentality suggest its latent character as dangerous"); Duckworth v. State, 477 So. 2d 935, 938 (Miss. 1985) (recognizing that the dangerous weapon issue is a question of fact to be determined by the jury); State v. Bonner, 694 N.E.2d 125, 131 (Ohio Ct. App. 1997) (noting that the trial court did not err in asking the jury to decide whether, in light of all the evidence, a toy metal gun was a dangerous weapon); Beeler v. State, 334 P.2d 799, 806 (Okla. Crim. App. 1959) (recognizing that some objects are so "clearly lethal" that they may be classified as dangerous weapons as a matter of law; however, when an object is not "clearly lethal," but is capable of being used in a lethal manner, it is for the jury to decide whether, in fact, the object was used in a way likely to "produce death or great bodily harm"); State v. Bennett, 493 S.E.2d 845, 851 (S.C. 1997) ("[W]hether an instrument used in the commission of a robbery qualifies as a deadly weapon . . . is a factual determination for the jury."); Triplett v. State, 686 S.W.2d 342, 343 (Tex. Ct. App. 1985) ("In the absence of serious bodily injury, the jury must discern the manner of the knife's use *or* its intended use, its capacity to produce death or serious bodily injury, as well as its size, shape, and sharpness in determining whether the knife is a deadly weapon."); State v. Choat, 363 S.E.2d 493, 502 (W. Va. 1987) (noting that when the instrument involved in an offense is not dangerous or deadly *per se*, the trial court must allow the jury to determine whether the object in question is a dangerous or deadly weapon, unless the trial court determines as a matter of law that the jury could not reach any other conclusion).

111. *See, e.g.*, *Sturgis*, 48 F.3d at 788 (holding that the determination of whether a particular object constitutes a dangerous or deadly weapon "must be left to the jury to determine"); *Schoenborn*, 4 F.3d at 1433 (maintaining that whether an object is dangerous or deadly is a factual issue which "depends on the particular circumstances of each case"); Anderson v. State, 328 Md. 426, 438, 614 A.2d 963, 968 (1992) (maintaining that the trier

Court of Appeals abandoned this long-followed practice in *Handy v. State* and provided no reason for doing so.

a. A Departure from Maryland Precedent.—Prior Maryland case law left the trier of fact to determine whether an object that is not *per se* dangerous or deadly could be considered a dangerous weapon due to the manner in which it was used during a robbery.[112] The court's decision in *Handy* is a departure from this established practice of leaving factual issues to the trier of fact.[113]

Whether an object is dangerous or deadly is a factual issue that has repeatedly surfaced in the court's discussion of Maryland's armed robbery statute. The Court of Appeals noted in *Handy* and in *Brooks* that the "dangerous or deadly weapon" clause of the armed robbery statute, Article 27, section 488 of the Maryland Annotated Code, should be interpreted in light of the related concealed weapons statute, Article 27, section 36 of the Code.[114] The *Handy* court recognized that the concealed weapon statute was relevant in interpreting Maryland's armed robbery statute, since it demonstrated the legislature's intent that the trier of fact objectively determine the dangerous or deadly weapon issue.[115] The court explained that section 36 offers a good indication of which instruments the legislature intended to treat as dangerous or deadly weapons.[116] The court also recognized that section 36 is merely a starting point for evaluating what constitutes a dangerous or deadly weapon, and when an object is not *per se* dangerous or deadly, it becomes necessary to engage in a factual anal-

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of fact must determine what constitutes a dangerous or deadly weapon when the legislature has not labeled the item as dangerous or deadly *per se*).

112. For prior Maryland cases in which the trier of fact determined whether an object was a dangerous weapon, see, for example, *Anderson*, 328 Md. at 438, 614 A.2d at 968; *Hayes v. State*, 211 Md. 111, 114, 126 A.2d 576, 577 (1956); and *Wright v. State*, 72 Md. App. 215, 221, 528 A.2d 498, 501 (1987).

113. *See supra* notes 109-112 (discussing prior cases in Maryland and in other jurisdictions holding that the determination of what constitutes a dangerous or deadly weapon is a factual inquiry to be left to the trier of fact); *see also* 67 AM. JUR. 2D *Robbery* § 6, at 54 (1985) (stating that whether an object, which is not a weapon in the strict sense, constitutes a dangerous or deadly weapon in the armed robbery context is a question of fact).

114. *Handy*, 357 Md. at 692, 745 A.2d at 1110; Brooks v. State, 314 Md. 585, 599, 552 A.2d 872, 879-80 (1989).

115. *Handy*, 357 Md. at 692, 745 A.2d at 1111 (explaining that in order to put a statute in its proper context, the court must look at "the relationship [of the statute under consideration] to earlier and subsequent legislation . . . ." (citations omitted) (internal quotation marks omitted) (quoting Kaczorowski v. Mayor of Baltimore, 309 Md. 505, 515, 525 A.2d 628, 632-33 (1987)).

116. *Id.* at 692, 745 A.2d at 1111.

ysis of the manner in which the object was used.[117] Continuing in this vein, the *Handy* court observed that Section 36 "embodied the Legislature's intent that the *trier of fact* determine objectively whether the facts supported that an object *was used* as a dangerous or deadly weapon."[118]

The court explained that for objects which are not specifically labeled by the legislature as *per se* dangerous or deadly weapons, the trier of fact must objectively determine, based upon the facts adduced at trial, whether the object in question was used in a dangerous or deadly way.[119] However, after explaining this requirement, the *Handy* court completely ignored its own directive. Instead of delegating this fact-based determination to the trier of fact, the court recharacterized the dangerous weapons issue as a question of law, giving the trial court *carte blanche* to determine what constitutes a dangerous weapon.[120] Furthermore, the *Handy* court provided no explanation or reason for reassigning the determination of this factual matter to the trial court.

As demonstrated in the court's analysis in *Handy* and *Brooks*, an examination of the concealed weapons statute is helpful in interpreting the legislative purpose of the armed robbery statute of the Code.[121] Similarly, in *Anderson v. State*,[122] the Court of Appeals likewise noted the importance of the concealed weapons statute in deciphering whether an object qualified as a dangerous weapon under the armed robbery statute.[123] In *Anderson*, the court considered whether the concealed carrying of a utility knife violated the concealed weapons statute.[124] The court noted that there are many objects besides those enumerated in the statute that are capable of being used as a dangerous or deadly weapon.[125] As the court explained, for all ob-

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117. *Id.* ("This statute [Article 27, section 36] gives us an indication of what sort of implements the legislature believed to be dangerous or deadly weapons. It is apparent that the term encompasses only those devices that are inherently dangerous or deadly or that may be used with dangerous or deadly effect." (citations omitted)).

118. *Id.*, 745 A.2d at 1110 (emphasis added).

119. *Id.* at 692-93, 745 A.2d at 1110-11.

120. *See id.* at 694, 745 A.2d at 1111 (holding that "whether it is possible for an object to be used as a deadly or dangerous weapon and whether its use in a particular way constitutes the use of a dangerous or deadly weapon in the commission of a criminal offense is a matter of law for the court").

121. *See supra* note 117 (discussing the usefulness of section 36 (the concealed weapons statute) in interpreting what sort of implements qualify as dangerous or deadly weapons under section 488 (Maryland's armed robbery statute)).

122. 328 Md. 426, 614 A.2d 963 (1992).

123. *Id.* at 434-35, 614 A.2d at 966-67.

124. *Id.* at 428, 614 A.2d at 964; see also *supra* note 95 for pertinent parts of section 36(a)(1).

125. *Anderson*, 328 Md. at 428, 614 A.2d at 964.

jects which are not specifically enumerated among the *per se* dangerous or deadly weapons in the concealed weapons statute, the State must demonstrate that the object in question falls under the catch-all class of "any other dangerous or deadly weapon of any kind."[126] The court continued, instructing that "[i]n order to violate 36(a) by the concealed wearing or carrying of an instrument which has not legislatively been declared to be a dangerous or deadly weapon *per se*, the *trier of fact* must first determine whether the instrument constitutes a 'dangerous or deadly weapon.'"[127]

Despite the court's holding in *Anderson* that the trier of fact must determine whether an innocuous object is deadly or dangerous, the *Handy* court held that whether an object can be used as a dangerous weapon, and whether the object's actual use on a particular occasion constituted the use of a dangerous or deadly weapon, are both questions of law for the trial court to determine.[128] Although the *Handy* court continued to recognize the relational importance of the concealed weapons statute for determining the legislative intent embodied in the armed robbery statute, it failed to follow its prior interpretation that the trier of fact must determine what constitutes a dangerous or deadly weapon when an instrument has not been legislatively declared to be deadly or dangerous *per se*.

b. Other Jurisdictions.—Finding no support under Maryland law, the *Handy* court looked to other jurisdictions in search of support for its conclusion that the trial court should determine, as a matter of law, whether an object qualifies as a dangerous or deadly weapon in *all* cases involving armed robbery.[129] The court commented that other cases that have addressed the issue of the potentially dangerous nature of an object used during a robbery offer "a less than complete analysis" of which issues are purely factual matters.[130] The court commented that while most other jurisdictions reached "the correct bottom line holdings" on the issue of dangerousness in armed robbery

126. *Id.* at 434, 614 A.2d at 966 (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 36(a)(1) (1996)).

127. *Id.* at 438, 614 A.2d at 968 (emphasis added).

128. *Handy*, 357 Md. at 690-91, 745 A.2d at 1109-10.

129. *Id.* at 694-95, 745 A.2d at 1111-12; *see supra* note 110 (citing cases from various jurisdictions which have all held that the dangerous weapons issue is a question of fact that must be submitted to the jury when the object's dangerousness depends upon the manner in which it was used).

130. *Handy*, 357 Md. at 694-95, 745 A.2d at 1112.

cases, they failed to describe the "intervening step" for arriving at the "correct" holding that the Maryland court discusses in *Handy*.[131]

According to the Court of Appeals, this missing "intervening step" is a decision by the trial court as to whether an object should be considered dangerous or deadly in all instances of armed robbery.[132] The trier of fact's only responsibility is to determine whether the object was used as the State alleges.[133] What the *Handy* court characterized as an "intervening step" is a substantial doctrinal step that the court failed to explain in its opinion. The court offered no support, in Maryland or otherwise, for transforming the determination of what constitutes a dangerous weapon into a question of law. The court's "intervening step" is likewise inconsistent with the legislature's intention to have the trier of fact objectively determine whether an instrument was used as a dangerous or deadly weapon.[134] It is this "step" that takes the factual consideration of whether an object was used in a dangerous way in the commission of a robbery, and turns it into a question of law.

5. Conclusion.—In *Handy v. State*, the Court of Appeals held that pepper spray constituted a dangerous weapon under Maryland's armed robbery statute. In arriving at this conclusion, the court established a new methodology for evaluating the dangerousness of instrumentalities used in the commission of a robbery. The court unilaterally declared that the determination of what constitutes a dangerous weapon is a question of law for the trial court to decide. The court's position on this issue is inapposite to the legislative history of the armed robbery statute, a departure from Maryland's own case law, and against the overwhelming authority of many other jurisdictions. Since the *Handy* court failed to provide any explanation for recharacterizing this traditionally fact-based question as a question of law, one can only speculate as to the court's motivations. If the court's opinion represents an effort merely to provide "precise marching orders" for evaluating the dangerous weapon question in armed robbery cases, it comes at a very high price.

In arriving at this narrow holding to treat pepper spray and other tear gas devices as dangerous weapons, the court prompts discussion

131. *Id.* at 694, 745 A.2d at 1112.

132. *Id.* at 695, 745 A.2d at 1112.

133. *Id.* at 696, 745 A.2d at 1112.

134. *See id.* at 692, 745 A.2d at 1110 (noting that the concealed weapons statute, which the court has repeatedly used in interpreting the armed robbery statute, "embodied the Legislature's intent that the trier of fact determine objectively whether the facts supported that an object was used as a dangerous or deadly weapon").

as to the broader question of which issues are for the trier of fact and which issues are questions of law to be determined by the trial court. The court ultimately concluded that, in all circumstances, it is the trial court's responsibility to determine which objects are dangerous or deadly weapons. In so holding, the *Handy* court trampled upon the long-established tradition of leaving factual matters to the trier of fact, and failed to provide any reason for doing so.

TODD M. REINECKER

D. *Eliminating the One-Sided Enforcement Approach to Maryland's Anti-Prostitution Laws*

In *McNeil v. State*,[1] the Court of Appeals upheld the conviction of Sheldon Gary McNeil, who was charged with the crime of soliciting for the purpose of prostitution under Article 27, section 15(e) of the Annotated Code of Maryland.[2] The court held that section 15(e) applied not only to prostitutes, but to their potential customers as well.[3] While the statute's language is ambiguous as to the meaning of the crimes listed in section 15, the court correctly concluded that the General Assembly did not intend section 15(e) to have gender-specific meaning.[4] Rather, the legislators intended Maryland's prohibition of soliciting for the purpose of prostitution to apply to all potential offenders, regardless of their role in the crime.[5] The *McNeil* court's holding sets an important precedent that provides for equal treatment of criminal actors.[6] Furthermore, the court's decision allows for more efficient law enforcement efforts, as the law holds all participants responsible for attempting to solicit prostitution.[7]

1. The Case.—On the evening of July 9, 1996, the Baltimore City Police conducted a prostitution sting operation.[8] As part of the operation, Officer Bernadette Giblin posed as a prostitute and walked along McHenry Street in Baltimore City.[9] Sheldon Gary McNeil was driving in the area that evening when he stopped his car, made eye contact with Officer Giblin, and motioned for her to approach.[10] When she arrived at the driver's side window, McNeil asked Officer Giblin if she "was working."[11] Officer Giblin understood McNeil's

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1. 356 Md. 396, 739 A.2d 80 (1999).

2. *Id.* at 398, 739 A.2d at 81. Section 15 (e) states: "It shall be unlawful . . . [t]o procure or to solicit or to offer to procure or solicit for the purpose of prostitution, lewdness or assignation." MD. ANN. CODE art. 27, § 15(e) (1999).

3. *McNeil*, 356 Md. at 420, 739 A.2d at 93-94.

4. *See infra* notes 120-142 and accompanying text (discussing the court's use of statutory interpretation principles to arrive at its conclusion).

5. *See McNeil*, 356 Md. at 403-04, 739 A.2d at 84 (quoting *In re Adoption No. 12612*, 353 Md. 209, 233, 725 A.2d 2037, 2049 (1999)).

6. *See infra* notes 143-159 and accompanying text (explaining how the court's holding will allow for equal treatment of prostitutes and johns).

7. *See infra* notes 160-169 and accompanying text (arguing that prostitution enforcement efforts will be improved by extending section 15(e)'s application to customers of prostitutes).

8. *McNeil*, 356 Md. at 399, 739 A.2d at 82.

9. *Id.*

10. *Id.*

11. *Id.* (internal quotation marks omitted).

question as a reference to whether she was working as a prostitute.[12] After answering affirmatively, Officer Giblin inquired of McNeil what he was "looking for."[13] To this, McNeil replied "half and half."[14] Based on her training and experience, Officer Giblin understood this to mean half fellatio and half sexual intercourse.[15] Upon hearing McNeil's request, Officer Giblin motioned to a team of police officers, who immediately arrested McNeil.[16]

Sergeant Clark of the Anne Arundel County Police Department was observing the police sting operation that evening.[17] His interest in the operation arose from an investigation he had been conducting into the rape and abduction of a prostitute in Anne Arundel County.[18] Both the victim in that case and another young prostitute who reported a similar attack had given descriptions of their assailant that matched McNeil and his vehicle.[19] Following McNeil's arrest, the police took him to the Baltimore City police station for questioning.[20] McNeil then voluntarily accompanied Sergeant Clark to the Anne Arundel County police station for further questioning.[21] While there, McNeil denied any involvement in the two rapes and provided hair, blood, and saliva samples.[22] The Anne Arundel County police then drove McNeil to his cousin's house and released him.[23] A few days later, after the rape victim identified a police photograph of McNeil as her attacker, the police again arrested McNeil.[24]

McNeil stood trial in the Circuit Court for Anne Arundel County for first-degree rape, first-degree sexual offense, kidnapping, and

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12. *Id.*

13. *Id.* (internal quotation marks omitted).

14. *Id.* (internal quotation marks omitted).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 398-400, 739 A.2d at 81-82. The rape under investigation by Sergeant Clark was the rape for which McNeil was ultimately convicted in this case. *Id.* at 397-98, 739 A.2d at 810. Although Sergeant Clark had knowledge of two similar attacks, both beginning in Baltimore City where the prostitutes were picked up and ending in the same wooded area in Anne Arundel County, the instant case involved only the one committed on May 17, 1996. *Id.* at 398, 739 A.2d at 81.

19. *Id.* at 398-99, 739 A.2d at 81. The victims of the two attacks described their assailant as a white male with a heavy build, brown hair, and a mustache. *Id.* at 398, 739 A.2d at 81. They reported that he drove a blue Toyota with a torn roof lining and a radio installed upside-down. *Id.*, 739 A.2d at 81-82. McNeil's car matched this description.

20. *Id.* at 399, 739 A.2d at 82.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 399-400, 739 A.2d at 82.

other lesser included offenses.[25] In its prosecution of McNeil, the State attempted to introduce the evidence obtained from his arrest on July 9th.[26] In response, McNeil filed a motion to suppress all evidence gained from that arrest on the theory that the police had obtained the evidence from an unlawful arrest.[27] McNeil argued at the suppression hearing that his activity on the night of July 9th did not rise to the level of criminality under Article 27, section 15(e) of the Annotated Code of Maryland,[28] which makes it unlawful "[t]o procure or to solicit or to offer to procure or solicit for the purpose of prostitution, lewdness or assignation."[29] The court denied the motion, and the jury found McNeil guilty of all charges.[30]

McNeil appealed to the Court of Special Appeals, arguing that soliciting for prostitution does not apply to potential customers of a prostitute under section 15(e).[31] In an unreported opinion, the court held that, under section 15(e), "if the act of sexual intercourse had been completed, both parties to it could be convicted of prostitution, and thus both could also be convicted of soliciting for prostitution."[32] Consequently, the Court of Special Appeals upheld the lower court's conviction.[33]

In his petition for certiorari to the Court of Appeals, McNeil presented two questions to the court.[34] First, McNeil raised the question of whether the crime of solicitation for the purpose of prostitu-

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25. *Id.* at 397, 739 A.2d at 81.

26. *Id.* at 400, 739 A.2d at 82. The evidence obtained from the July 9th arrest and used at trial to identify McNeil as the attacker included the victim's identification of McNeil's photograph, a knife discovered at McNeil's apartment, hair, blood, and saliva samples, and the two descriptions by the victims of McNeil's car. *Id.*

27. *Id.*

28. *Id.* at 401-02, 739 A.2d at 83 (referring to MD. ANN. CODE art. 27, § 15(e) (1999), and suggesting that because no compensation had been discussed or agreed upon, "just asking for sex alone" was not a crime).

29. Art. 27, § 15(e). Section 16 of Article 27 defines the relevant terms as follows:

> The term "*prostitution*" shall be construed to mean the offering or receiving of the body for sexual intercourse for hire. The term "*lewdness*" shall be construed to mean any unnatural sexual practice. The term "*assignation*" shall be construed to include the making of any appointment, or engagement for prostitution or lewdness or any act in furtherance of such appointment or engagement.

Art. 27, § 16(e).

30. *McNeil*, 356 Md. at 397, 739 A.2d at 81. McNeil was sentenced to "concurrent life sentences for the rape and sexual offense and a consecutive ten-year sentence for the kidnapping." *Id.* at 397-98, 739 A.2d at 81.

31. *Id.* at 402, 739 A.2d at 83.

32. *Id.*

33. *Id.*

34. *Id.*, 739 A.2d at 83-84.

tion applied to potential customers of prostitutes.[35] Second, if the court held section 15(e) applicable to potential customers, McNeil questioned whether the police had probable cause to believe that he had committed that crime before his arrest.[36] McNeil argued that, if the court answered either question in the negative, the evidence on which the jury convicted him of the rape and kidnapping was the fruit of an illegal arrest and should have been suppressed.[37]

2. *Legal Background.*—Maryland's current statute addressing prostitution originated with the enactment of section 19 of Chapter 737 of the Laws of Maryland in 1920.[38] Since then, this law has received little attention by the appellate courts despite the large number of arrests made under its various sections.[39] In a handful of cases, however, the courts have provided some meaning to the statute when they resolved controversies concerning the law's application and constitutionality. For example, Maryland courts have concluded that the legislature did not intend for section 15(e) to be limited in its application to the behavior of prostitutes alone.[40] In addition, Maryland courts upheld the law against a constitutional challenge for vagueness and upon First Amendment grounds, determining that the law's pivotal term, "solicit," did not address the common-law crime of solicitation.[41] The issue of whether johns could be convicted of soliciting prostitutes remained unresolved until the *McNeil* decision—nearly eighty years after the enactment of section 15(e).[42] Most other states,

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35. *Id.*, 739 A.2d at 84.

36. *Id.* This question assumed that McNeil was arrested pursuant to section 15(e), a point that was unclear at times. *See id.* at 401-02 n.3, 739 A.2d at 83 n.3.

37. Brief of Petitioner at 19-20, *McNeil* (No. 131).

38. 1920 Md. Laws 737; Brief of Petitioner at 6, *McNeil* (No. 131) (indicating that the language of section 15(e) has not been amended since its enactment).

39. *See McNeil*, 356 Md. at 417-18, 739 A.2d at 92 (noting that hundreds of arrests are made each year for prostitution-related offenses).

40. *See, e.g.*, Savoy v. State, 236 Md. 36, 39, 202 A.2d 324, 326 (1964) (holding that section 15(e) applied to one who offered to procure prostitutes for undercover police officers); Lutz v. State, 167 Md. 12, 17, 172 A. 354, 356 (1934) (holding that section 15(e) applied to keepers of a "bawdy house").

41. Cherry v. State, 18 Md. App. 252, 264-66, 306 A.2d 634, 641-42 (1973) (holding that section 15(e) was not void for vagueness and did not infringe upon the defendant's First Amendment right to free speech).

42. *See McNeil*, 356 Md. at 403, 739 A.2d at 84 (noting that the court was asked to interpret section 15(e), which was originally enacted in 1920). The term "john" refers generally to a male customer who patronizes a prostitute. Julie Lefler, Note, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 11 (1999).

however, have dealt with this issue through clear legislation that ensures equal criminal treatment of prostitutes and johns.[43]

a. Rules of Statutory Interpretation Under Maryland Law.—As the *McNeil* court indicates, the goal of the Maryland courts in interpreting statutory language has been to "discern and effectuate the intent of the legislature at the time it enacted the statute."[44] In *Philip Electronics v. Wright*,[45] the Court of Appeals summarized the process by which courts in Maryland are to ascertain statutory meaning:

> In interpreting the [statute], we apply the following general principles. First, if the plain meaning of the statutory language is clear and unambiguous, and consistent with both the broad purposes of the legislation, and the specific purpose of the provision being interpreted, our inquiry is at an end. Second, when the meaning of the plain language is ambiguous or unclear, we seek to discern the intent of the legislature from surrounding circumstances, such as legislative history, prior case law, and the purposes upon which the statutory framework was based.[46]

The court in *McNeil* approached the case using this model for statutory interpretation to ascertain whether the crime of soliciting for prostitution applied to potential customers of prostitutes.[47]

b. The Court Determined Section 15(e) Does Not Apply to Prostitutes Alone.—In the 1934 decision of *Lutz v. State*,[48] the Court of Appeals first resolved a controversy under what was to become section 15. The court held that when the General Assembly repealed the penalty for keeping a "bawdy house" by enacting chapter 737 of the 1920 Act, legislators did not eliminate the common-law *offense* of keeping a

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43. *See, e.g.*, CONN. GEN. STAT. §§ 53a-82 & 53a-83 (1999) (devoting separate sections of the statute to the behavior of prostitutes and johns); IDAHO CODE §§ 18-5613 & 18-5614 (Michie 2000) (same); IND. CODE ANN. §§ 35-45-4-2 & 35-45-4-3 (Michie 2000) (same); MASS. ANN. LAWS ch. 272, § 53A (Law. Co-op. 2000) (criminalizing specifically the behavior of a john); TEX. PENAL CODE ANN. § 43.02 (Vernon 2000) (providing penalties for one who either receives or pays a fee in connection with sexual conduct); VA. CODE ANN. § 18.2-346 (Michie 2000) (devoting separate sections of the statute to the behavior of prostitutes and johns).

44. *McNeil*, 356 Md. at 404, 739 A.2d at 84 (quoting *In re* Adoption No. 12612, 353 Md. 209, 233, 725 A.2d 1037, 1049 (1999) (involving a contested custody dispute relating to the court's interpretation of section 9-101 of the Family Law Article)).

45. 348 Md. 209, 703 A.2d 150 (1997).

46. *Id.* at 216-17, 703 A.2d at 153 (citations omitted).

47. *McNeil*, 356 Md. at 403-04, 739 A.2d at 84.

48. 167 Md. 12, 172 A. 354 (1934).

bawdy house.[49] The court suggested that the drafters of the 1920 statute intended that the law apply to customers of prostitution.[50] The court stated that "the statute is directed to the suppression of sexual vice and perversion practiced for gain, and condemns equally those employed in connection with the commerce, *the patrons of the establishment used therefor,* and the keeper thereof."[51]

In *Savoy v. State*,[52] the court refused to limit the application of section 15(e) only to prostitutes.[53] The court affirmed the conviction of a male who had offered to procure prostitutes for two undercover police officers.[54] The court held that the defendant was properly convicted, although the accused had not taken money from the undercover police officer, nor did he reveal where he was taking the officers.[55]

c. Section 15(e) Withstands a Constitutional Challenge.—Nine years after *Savoy*, the Court of Special Appeals upheld the constitutionality of section 15(e) in *Cherry v. State*.[56] The defendant in *Cherry*, charged with soliciting for "purposes of prostitution, lewdness and assignation,"[57] challenged the constitionality of the section, arguing that it violated his First Amendment right to free speech, and that it was unconstitutionally vague under the Fourteenth Amendment.[58] Disagreeing with the defendant, the court stated that "no authoritative holding . . . extends First Amendment protection to a solicitation to

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49. *Id.* at 17, 172 A. at 356. Under common law, the offense of keeping a bawdy house consisted of "maintaining, some place, whether a house, a boat, a tent, or a vehicle, kept open to the public for licentious commerce." *Id.* at 16, 172 A. at 356 (citing JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 1083 (9th ed. 1923)).

50. Chapter 737 of the 1920 Act is now codified as section 15 of Article 27. *See* Brief of Petitioner at 6, *McNeil* (No. 131) (indicating that the General Assembly originally enacted the exact language of section 15(e) under Chapter 737 of the 1920 Act); *see also Lutz*, 167 Md. at 16-17, 172 A. at 356 (comparing the narrow language of the common-law definition to the broader statutory language).

51. *Lutz*, 167 Md. at 16-17, 172 A. at 356 (emphasis added).

52. 236 Md. 36, 202 A.2d 324 (1964).

53. *Id.* at 39, 202 A.2d at 326.

54. *Id.* at 40, 202 A.2d at 326.

55. *Id.* at 39, 202 A.2d at 326.

56. 18 Md. App. 252, 306 A.2d 634 (1973).

57. *Id.* at 253, 306 A.2d at 635.

58. *Id.* The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. The United States Constitution and its amendments were made applicable to the states through the adoption of the Fourteenth Amendment. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266-67 (1964). Under the Fourteenth Amendment, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

commit an act lawfully prohibited by statute."[59] The vagueness challenge also lacked merit according to the court.[60] It reasoned that, since the statutes criminalizing prostitution, lewdness, and assignation were constitutional, "it follows that the ancillary and inchoate crime of soliciting the commission of an act of prostitution, lewdness, or assignation is similarly not unconstitutional for vagueness or for overbreadth."[61]

The *Cherry* court also found that the term "solicit," as used in section 15(e), referred to the common-law offense of solicitation.[62] Under the crime of solicitation at common law, it was unlawful to counsel, entice, or induce another to commit a criminal offense.[63] Furthermore, the court found that solicitation, as defined by common law, was a criminal *act* and not a form of speech to be protected by the First Amendment.[64]

Several years later, in the case of *In re Appeal No. 180*,[65] the Court of Appeals examined *Cherry* and the conclusion of the Court of Special Appeals with regard to the term "solicit."[66] In *In re Appeal No. 180*, the court essentially overruled *Cherry* and held that "solicit," as used in section 15(e), "was not used with reference to the common-law crime of solicitation, but in the common, ordinary meaning of the word as understood and used by the general public."[67] In reaching its conclusion, the court identified three reasons why it decided that the General Assembly intended "solicit" to be given its ordinary meaning.[68] First, the use of the term "solicit" in other Maryland statutes was used for its common and ordinary meaning.[69] Second, courts from other states had not referred to the common-law offense of solicitation when they addressed issues of solicitation in the context of prostitu-

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59. *Cherry*, 18 Md. App. at 263, 306 A.2d at 640 (quoting *Riley v. United States*, 298 A.2d 228, 233 (D.C. 1972), and comparing "solicitation to commit kidnapping, murder or treason, on the one hand, and to commit prostitution, lewdness or assignation, on the other").

60. *Id.* at 264, 306 A.2d at 641 (explaining that section 16 limits the terms of section 15(e) by precisely defining "prostitution" and "assignation").

61. *Id.* at 266, 306 A.2d at 642.

62. *Id.* at 257-58, 306 A.2d at 637-38 (citing CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES (7th ed. 1967)).

63. *Id.*, 306 A.2d at 637-38.

64. *Id.* at 263, 306 A.2d at 640 (comparing the *Riley* holding where the District of Columbia Court of Appeals refused to extend First Amendment protection to a solicitation to commit an act lawfully prohibited by statute).

65. 278 Md. 443, 365 A.2d 540 (1976).

66. *Id.* at 444-45, 365 A.2d at 541.

67. *Id.* at 452, 365 A.2d at 544-45.

68. *Id.* at 446, 365 A.2d at 541.

69. *Id.* at 446-47, 365 A.2d at 541-42 (comparing the use of "solicit" in statutes involving retail dealers and attorneys).

tion.[70] Finally, the court turned to several dictionary definitions of "solicit" to dispel any remaining doubts as to whether the term referred to the common-law crime.[71]

d. Most States Provide for Equal Treatment of Prostitutes and Johns.—Maryland is not alone in its effort to punish those who offer to pay for prostitution. States across the country have passed laws criminalizing the patronization of a prostitute.[72] Indeed, many states, such as Maryland, do not recognize a distinction in the way they punish prostitutes and johns.[73] In other states, however, patronizing a prostitute either is not a criminal act or is not punished to the same degree as prostitution.[74]

There are two general versions that predominate among the state statutes that criminalize the acts of prostitutes and their patrons. One version combines the criminal activity associated with prostitution under a single section,[75] and the other devotes one section to the acts of the prostitute and one section to the acts of the patron.[76]

Like Maryland, several states have adopted the first version and address the behavior of prostitutes and their customers under one section.[77] The relevant Massachusetts statute, for example, provides penalties for "[a]ny person who engages, agrees to engage, or offers to

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70. *Id.* at 447-51, 365 A.2d at 542-44 (examining statutes from California, the District of Columbia, Illinois, and Michigan).

71. *Id.* at 451-52, 365 A.2d at 544.

72. *See* Lefler, *supra* note 42, at 19 (explaining that most states now punish both prostitutes and their customers).

73. MD. ANN. CODE art. 27, § 15(e) (1999); *see* Lefler, *supra* note 42, at 18-19 (using the Massachusetts statute, MASS. GEN. LAWS ANN. ch. 272, § 53A (Law. Co-op. 2000), as a prime example of a completely gender-neutral law). Section 15 covers all prostitution-related behavior that is prohibited in Maryland. Art. 27, § 15(a)-(g). Section 17 imposes a uniform punishment on all violations of "any of the provisions of § 15." Art. 27, § 17.

74. Lefler, *supra* note 42, at 16-18 (citing the statutes of Kentucky and Alaska as examples of statutes that do not recognize patronizing a prostitute as criminal and citing Colorado, Kansas, and Illinois as states whose statutes punish both prostitutes and customers but do so unequally). One explanation for unequal punishment is that more severe punishment for women represents their greater involvement in the crime. *See id.* at 17-18 (suggesting that because prostitutes receive money, they should be punished more harshly).

75. *See, e.g.*, MASS. ANN. LAWS ch. 272, § 53A (addressing the behavior of the prostitute and john under the same section); TEX. PENAL CODE ANN. § 43.02 (Vernon 2000) (same).

76. *See, e.g.*, CONN. GEN. STAT. §§ 53a-82 & 53a-83 (1999) (addressing the behaviors of prostitutes and johns in separate sections of the statute); IDAHO CODE §§ 18-5613 & 18-5614 (Michie 2000) (same); IND. CODE ANN. § 35-45-4-2 & 35-45-4-3 (Michie 2000) (same); VA. CODE ANN. § 18.2-346 (Michie 2000) (same).

77. *See, e.g.*, MASS. ANN. LAWS ch. 272, § 53A (providing penalties for one who either receives or pays a fee in connection with sexual conduct); TEX. PENAL CODE ANN. § 43.02 (same).

engage in sexual conduct with another person in return for a fee."[78] Under the same section, the statute also penalizes the behavior of "any person who pays, agrees to pay or offers to pay another person to engage in sexual conduct."[79] Unlike the Maryland statute, the Massachusetts law particularly distinguishes between the separate acts of the prostitute who offers to engage and the patron who offers to pay.[80]

Other states that punish both prostitution participants equally also clearly identify the separate behaviors of the patron and the prostitute.[81] For example, Virginia separates its prostitution statute into subsections that identify the criminal behavior of the john and prostitute.[82] Other states, such as Connecticut, Idaho, and Indiana, devote separate full sections to the behavior of prostitutes and johns.[83] By addressing the crimes of prostitutes and johns in separate sections, these statutes indicate plainly that the laws are not limited to the behavior of the prostitute alone.

By contrast, the Maryland General Assembly did not articulate clearly that the john's criminal behavior is recognized in addition to the prostitute's actions.[84] Consequently, the courts were left to decide whether johns could be convicted under section 15(e) of soliciting for the purpose of prostitution.

3. The Court's Reasoning.—In *McNeil v. State*, the Court of Appeals held that the statutory criminal offense of soliciting for the purpose of prostitution under Article 27, section 15(e) applies to "the conduct both of the prostitute (and his/her agents) in soliciting potential customers and of the potential customer in soliciting the prostitute."[85] The majority opinion, written by Judge Wilner, described the case as "purely one of statutory interpretation—the scope and meaning of § 15(e)."[86]

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78. MASS. ANN. LAWS ch. 272, § 53A.

79. *Id.*

80. *Id.*

81. *See, e.g.*, CONN. GEN. STAT. §§ 53a-82 & 53a-83; IDAHO CODE §§ 18-5613 & 18-5614; IND. CODE ANN. §§ 35-45-4-2 & 35-45-4-3; VA. CODE ANN. § 18.2-346.

82. *See* VA. CODE ANN. § 18.2-346(A) & (B) (regulating in subsection (A) the prostitute's criminal behavior and in subsection (B), the john's behavior).

83. *See* CONN. GEN. STAT. §§ 53a-82 & 53a-83; IDAHO CODE §§ 18-5613 & 18-5614; IND. CODE ANN. § 35-45-4-2 & 35-45-4-3.

84. *See* MD. ANN. CODE art. 27, § 15(e) (1999) (prohibiting soliciting for the purpose of prostitution and not clearly distinguishing the behaviors of the prostitute and the john).

85. *McNeil*, 356 Md. at 420, 739 A.2d at 93.

86. *Id.* at 403, 739 A.2d at 84; *see supra* note 2 (quoting the relevant language of section 15(e)). Prior to discussing the merits of the case in full, the court seemed to suggest that the State may have blundered strategically when it urged in its briefs to the Court of Appeals that McNeil's conduct constituted solicitation for the purpose of lewdness notwith-

The court based its analysis on the premise that the statute "would seem, clearly, to apply to *anyone* who solicits for the purpose of prostitution . . . [including] potential customers who solicit the prostitute."[87] The majority's opinion continued with a detailed discussion of how the law has evolved throughout history to combat the rise of prostitution in the United States.[88] Tracing the common law and statutory history of anti-prostitution laws, the majority highlighted lawmakers' willingness to provide sanctions not only against the prostitute, but also against third parties who benefit financially from the activity.[89] The court reasoned that history supported the proposition that anti-prostitution efforts were not directed solely at the prostitutes

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standing the solicitation to prostitution charge. *McNeil*, 356 Md. at 403, 739 A.2d at 84. Although the State accepted the issue posed by McNeil—whether soliciting for the purpose of prostitution was a crime that applied to potential customers—the court noted that this issue did not "necessarily arise with respect to solicitation for the purpose of lewdness . . . under § 15(e)" or to other offenses provided for in section 15 with which McNeil might have been charged. *Id.* The court then stated that if it had agreed with McNeil's proposition that the offense of solicitation for the purposes of prostitution did not apply to prospective customers' actions, it likely would have "recalled the writ of *certiorari* and dismissed the petition as improvidently granted." *Id.* The State, however, in its answer to McNeil's petition for certiorari, argued that the Court of Special Appeals correctly concluded that section 15(e) applied to potential customers of prostitutes. *Id.* at 402-03, 739 A.2d at 84. Consequently, the Court of Appeals accepted the issue framed by McNeil as stated in the State's answer to the petition, as opposed to the arguments set forth in its briefs. *Id.* at 403, 739 A.2d at 84. The court then found the case to be justifiable and chose to answer the questions posed by McNeil. *Id.*

87. *McNeil*, 356 Md. at 404, 739 A.2d at 85. In support of this premise, the court cited the California case, *Leffel v. Municipal Court*, in which the California Court of Appeals found no ambiguity in an anti-prostitution statute and held that the prohibition of solicitation concerned both prostitutes and their potential customers. *Id.* (citing 126 Cal. Rptr. 773, 777 (Cal. Ct. App. 1976)).

88. *McNeil*, 356 Md. at 405-16, 739 A.2d at 85-91. The majority examined the evolution of prostitution-related laws beginning with Maryland's adoption of English common law through the enactment in 1920 of the statute that is currently codified under section 15. *Id.* at 405-18, 739 A.2d at 85-92. Throughout the opinion, the court cited numerous historical works on the subject of prostitution. *See, e.g., id.* at 406 n.6, 739 A.2d at 85-86 n.6 (citing JOHN F. DECKER, PROSTITUTION: REGULATION AND CONTROL (1979); R. ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA 1900-1918 (1982); R. SYMANSKI, THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES (1981); H. BENJAMIN & R. MASTERS, PROSTITUTION AND MORALITY (1964)). The court attempted to explain, through this historical survey, how prostitution has evolved and why society has been determined to abolish it. *Id.*

89. *Id.* at 414-15, 739 A.2d at 90-91 (focusing on the work of vice commissions created to examine the prostitution epidemic). Maryland targeted those who might profit from the work of the prostitute, including the operators of brothels, pimps, and other procurers or intermediaries. *Id.* at 411-12, 739 A.2d at 88-89. Federal legislation prohibited transporting or assisting in the transporting of a female across state lines for the purpose of prostitution. *Id.* (referring to the Mann Act, which is currently codified under 18 U.S.C. § 2421 (2000)).

themselves until 1916 with the enactment of a Maryland statute directed at females who were considered to be "common prostitutes."[90]

The court noted that in 1920, the General Assembly enacted the statute that eventually became section 15 of Article 27.[91] The court found the differences between the 1916 and 1920 laws to be significant for several reasons.[92] First, the court noted the difference in the language of the two laws.[93] The 1916 statute was written with gender-specific language targeting females, while the 1920 law was gender neutral.[94] Second, the court found it illuminating that the 1920 statute "target[ed], for the first time, the soliciting of persons for [the] purpose [of prostitution], and the actual engaging in prostitution."[95] Third, the enforcement of the 1920 law led to the arrests of men as well as women, unlike arrests under the 1916 law.[96] Viewing the differences between these two laws as evidence of legislative intent, the court concluded that the 1920 law was meant to apply to both customers and prostitutes.[97]

Next, the court addressed McNeil's argument that the meaning of the term "solicit," as defined in *In re Appeal No. 180*,[98] refers only to "a woman or female prostitute accosting a male."[99] The majority rejected McNeil's reading of that case, reasoning that the definition of "solicit" as referring to female conduct was necessary in the context of *In re Appeal No. 180*, because that case concerned a female defen-

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90. *Id.* at 415-16, 739 A.2d at 91. In 1916, the General Assembly added a provision to the public local laws of Baltimore City declaring that "every female person who shall solicit . . . any male person . . . to engage in sexual intercourse or in any other immoral practice with her or any other person for compensation or reward shall be deemed a common prostitute." *Id.* (internal quotation marks omitted).

91. *Id.* at 416, 739 A.2d at 91; *see supra* note 2 (quoting the language of section 15(e)).

92. *McNeil*, 356 Md. at 416-17, 739 A.2d at 91.

93. *Id.* at 417, 739 A.2d at 91-92.

94. *Id.*, 739 A.2d at 92.

95. *Id.*

96. *Id.* at 417-18, 739 A.2d at 92. The Baltimore police arrest statistics cited by the court indicate a new enforcement approach to prostitution after the enactment of the 1920 statute. *See id.* (citing 1920 REPORT OF THE BD. OF POLICE COMM'RS FOR THE CITY OF BALTIMORE at 34). While the Baltimore City police arrested no males under the 1916 statute, the statistics showed that males became a common subject of the arrests under the 1920 law. *Id.* The court noted its skepticism that the males arrested during this period were male prostitutes or third-party profiteers of prostitution. *Id.* at 418, 739 A.2d at 92. The court viewed the arrest statistics as evidence that the Baltimore Police Department viewed the 1920 statute as applying to prostitutes and their patrons. *Id.*

97. *Id.* at 418, 739 A.2d at 92 (relying on its decision in *Lutz v. State*, 167 Md. 12, 16-17 (1934), in which the court held that the legislature intended to punish equally prostitutes and their patrons). See *supra* notes 48-51 and accompanying text for a discussion of *Lutz*.

98. 278 Md. 443, 365 A.2d 540 (1976).

99. *McNeil*, 356 Md. at 419, 739 A.2d at 93 (relying on one of the various standard dictionary definitions the court had cited in *In re Appeal No. 180*).

dant.[100] The court found that the legislature intended for "solicit" to be read more broadly, in the terms of "its ordinary meaning . . . as understood and used by the general public."[101] Under its ordinary meaning, the court concluded that the term "would necessarily include the conduct of the potential customer in soliciting the prostitute."[102]

The majority completed its discussion of the construction of section 15(e) by responding to additional cases cited by McNeil in support of his argument that section 15(e) applied only to the conduct of the prostitute.[103] The court disregarded *In re Carey*,[104] a nearly eighty-year-old California case that is no longer treated as precedential authority even in California.[105] Instead, the court focused on the more recent case of *Leffel v. Municipal Court*,[106] in which a California court held that "*all persons*, customers as well as prostitutes, who solicit an act of prostitution are guilty."[107] As for the other cases cited by McNeil, the court recognized that they interpreted solicitation laws as applicable only to females.[108] However, it found that each of these cases "either construe[d] statutory language that [was] unlike § 15(e) or [was] based on specific legislative history from which a clear intent to exclude the conduct of potential customers [was] evident."[109]

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100. *Id.*

101. *Id.* at 420, 739 A.2d at 93 (internal quotation marks omitted) (quoting *In re Appeal No. 180*, 278 Md. at 452, 365 A.2d at 544-45).

102. *Id.*

103. *Id.* at 420-23, 739 A.2d at 93-95.

104. 207 P. 271 (Cal. Dist. Ct. App. 1922) (involving an intermediate appellate court's interpretation of the California solicitation law as applying only to female prostitutes).

105. *McNeil*, 356 Md. at 421, 739 A.2d at 94. The court rejected *Carey* because it found the "condescending" attitude of the opinion to have "no place in today's jurisprudence." *Id.* The court further noted that subsequent California appellate decisions did not consider *Carey* binding precedent. *Id.* (citing Leffel v. Mun. Court, 126 Cal. Rptr. 773, 776 (Cal. Ct. App. 1976)). Thus, the court stated, "If *Carey* is not precedent in California, it has no value in Maryland." *Id.*

106. 126 Cal. Rptr. 773 (Cal. Ct. App. 1976).

107. *McNeil*, 356 Md. at 421, 739 A.2d at 94 (internal quotation marks omitted) (quoting *Leffel*, 126 Cal. Rptr. at 777).

108. *Id.* at 420-23, 739 A.2d at 94-95; *see, e.g.*, People v. Jones, 615 N.E.2d 391, 394-95 (Ill. App. Ct. 1993) (holding that Illinois's pandering statute applies neither to the prostitute nor to potential customer, but only to the "middle man" who arranges prostitution); Eisner v. Commonwealth, 375 S.W.2d 825, 827 (Ky. Ct. App. 1964) (holding that one indulging in sexual intercourse with a prostitute does not oneself commit prostitution); State v. Chandonnet, 474 A.2d 578, 580 (N.H. 1984) (holding that the New Hampshire legislature did not intend to prohibit patronizing a prostitute); State v. Wilbur, 749 P.2d 1295, 1296 (Wash. 1988) (holding that the Washington statute criminalizing prostitution did not apply to the potential customer).

109. *McNeil*, 356 Md. at 421, 739 A.2d at 94.

After answering the interpretation question, the court briefly addressed and discarded McNeil's alternative argument that Officer Giblin lacked probable cause for the arrest.[110] The court noted that McNeil beckoned to the officer and made clear through his behavior that he wanted sexual services in exchange for money.[111] McNeil's actions that evening, according to the majority, "[u]nquestionably" provided Officer Giblin with probable cause that he "had just solicited her to commit an act of prostitution," a violation of section 15(e).[112]

Judges Raker and Eldridge concurred in the result only.[113] In her concurring opinion, Judge Raker agreed that section 15(e) applied to both prostitutes and their potential customers and that Officer Giblin had probable cause to arrest McNeil.[114] Judge Raker argued, however, that the majority's extended historical discussion of prostitution was inappropriate in answering the question presented.[115] Because the case involved the question of whether a potential customer could be criminally responsible for soliciting for prostitution, she believed the majority should have focused its analysis on the history of the customer, not the prostitute.[116] In Judge Raker's view, the majority opinion provided an incomplete account of the history of prostitution, a social problem "far too complex to be viewed solely from the perspective of the Victorian reformers."[117]

4. Analysis.—In *McNeil v. State*, the Court of Appeals decided correctly that the crime of solicitation for the purpose of prostitution was not limited to those who would provide sexual intercourse in return for compensation.[118] In so holding, the court construed Article 27, section 15(e) according to Maryland's principles of statutory interpretation and included Maryland in the national trend of criminalizing the conduct of both prostitutes and their customers.[119] By

110. *Id.* at 423, 739 A.2d at 95.
111. *Id.*
112. *Id.*
113. *Id.* (Raker, J., concurring).
114. *Id.* at 423-24, 739 A.2d at 95.
115. *Id.* at 424, 739 A.2d at 95.
116. *Id.*, 739 A.2d at 96.
117. *Id.*, 739 A.2d at 95-96. Judge Raker found the historical discussion of prostitution to be incomplete without including the perspectives of feminists and prostitutes. *Id.* at 425, 739 A.2d at 96. According to Judge Raker's concurrence, the majority, in effect, produced a one-sided and Victorian-minded historical survey by omitting these alternative perspectives. *Id.* at 424-25, 739 A.2d at 96.
118. *McNeil*, 356 Md. at 420, 739 A.2d at 93.
119. *See* Lefler, *supra* note 42, at 19-22 (discussing the current measures taken by state legislatures to move toward equal treatment of female prostitutes and their male customers).

extending the application of section 15(e) to customers of prostitutes, the court sets an important precedent for promoting equal treatment of men and women. Furthermore, the law's intolerance of both prostitution and the source of its demand allows for more efficient enforcement of crimes under section 15.

a. The Court Correctly Construed Section 15(e) According to Maryland's Principles of Statutory Interpretation.—Although the statute under which McNeil was prosecuted could be subject to two interpretations, the court identified and applied the intended meaning of the subsection.[120] Had the court not maintained its loyalty to Maryland's well-established rules of statutory construction, it may have given meaning to section 15(e) that was not intended by the legislature, resulting in an incorrect decision.[121] In addition, the court came to the correct conclusion despite a paucity of case law.

To determine whether section 15(e) applied to both prostitutes and their potential customers, the court had to ascertain the intent of the General Assembly when the statute was enacted in 1920.[122] The statute clearly defines the meaning of the term "prostitution," and the court had previously addressed the meaning of the section's other pivotal term, "solicit."[123] In *McNeil*, the court had to determine whether the legislature intended the statute to be gender-specific.[124] The statute itself provided little guidance.[125] While the absence of any gender reference in the section would imply that the statute was directed at both sexes, prostitution has historically been a female-dominated activity.[126] Further complicating the question, the key term "solicit"

120. *McNeil*, 356 Md. at 403-04, 739 A.2d at 84 (recognizing that the court's goal was to effectuate the legislature's intent); *id.* at 405-20, 739 A.2d at 85-93 (reviewing the statute's history to better determine the legislature's intent).

121. *See* Phillip Elecs. v. Wright, 348 Md. 209, 216-17, 703 A.2d 150, 153 (1997) (discussing the necessity of examining legislative intent in arriving at the correct interpretation of statutory language).

122. *McNeil*, 356 Md. at 405, 739 A.2d at 85 ("The 1920 law dealing with prostitution was not a legislative afterthought. It was, instead, part of a movement that was national in scope and that had a considerable history, both in Maryland and elsewhere.").

123. MD. ANN. CODE art. 27, § 16 (1999) ("The term 'prostitution' shall be construed to mean the offering or receiving of the body for sexual intercourse for hire."); *In re* Appeal No. 180, 278 Md. 443, 452 (1976) (holding that the term "solicit" as used in section 15(e) was not used with reference to the common-law crime of solicitation).

124. *McNeil*, 356 Md. at 416-17, 739 A.2d at 91-92 (comparing the language of the 1920 statute to previous laws and concluding that the 1920 version is gender-neutral in both language and approach).

125. Art. 27, § 15(e) (prohibiting, in general terms, soliciting for the purpose of prostitution). For the language of section 15(e), see *supra* note 2.

126. *McNeil*, 356 Md. at 405 n.5, 739 A.2d at 85 n.5 (citing DECKER, *supra* note 88, at 16-17).

could conceivably apply to one who attempts to promote the sale of sex, one who attempts to buy sexual services, or both.[127]

Accordingly, the court looked to the maxims of statutory interpretation established by judicial precedent to determine legislative intent.[128] The entire decision therefore turned on the court's view of the purpose behind the General Assembly's enactment of Chapter 737 of the 1920 Act, later to become Section 15. The court did not have to look past the stark contrasts between the 1916 and 1920 Acts.[129] Nevertheless, in its effort to understand the historical context around which the 1920 Act was passed, the court presented a more detailed historical account of the development of prostitution law than was necessary for the purpose of responding to the controversy.[130] In particular, the court seemed to focus on the plight of the prostitute, while the issue was clearly the potential customer.[131] Judge Raker, in her concurring opinion, agreed that if the court was going "to engage in an historical study to answer the question presented in the certiorari petition, i.e., that of the treatment of the customer under the statute, [it] should focus on the treatment of the customer throughout history, and not the salesperson."[132]

Judge Raker seemed to suggest, further, that the majority's historical account failed to provide a well-rounded presentation of the prostitute in the United States and specifically in Maryland.[133] She objected to what she considered history "from the perspective of the Victorian reformers."[134] The majority opinion, in Judge Raker's view,

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127. *Id.* at 420, 739 A.2d at 93 (discussing the various meanings of the term "solicit").

128. *Id.* at 403-04, 739 A.2d at 84; *see also In re* Adoption No. 12612, 353 Md. 209, 233, 725 A.2d 1037, 1049 (1999) (stating that, in interpreting statutory language, the goal of the courts is to "discern and effectuate the intent of the legislature at the time it enacted the statute" (citing Brown v. Housing Comm., 350 Md. 570, 714 A.2d 197 (1998))); Phillip Elecs. v. Wright, 348 Md. 209, 216, 217, 703 A.2d 150, 153 (1997) (summarizing the general principles applied by the court in interpreting statutory language).

129. *Compare* 1916 MD. LAWS ch. 653, §§ 866-868 (providing for the criminal prosecution of "every *female* person who shall solicit or procure or attempt to solicit or procure . . . any male person or persons to engage in sexual intercourse or in any other immoral practice with her or any other person for compensation or reward" (emphasis added)), *with* 1920 MD. LAWS ch. 737, § 19(e) (making it unlawful to "procure or to solicit or to offer to procure or solicit for the purpose of prostitution, lewdness or assignation"). The mere change from gender-specific language in the 1916 Act to gender-neutral language in the 1920 Act demonstrates the General Assembly's intent to prohibit the customer as well as the prostitute from soliciting for the purpose of prostitution.

130. *See McNeil*, 356 Md. at 405-18, 739 A.2d at 85-92.

131. *See id.* at 409, 739 A.2d at 87.

132. *Id.* at 424, 739 A.2d at 96 (Raker, J., concurring).

133. *See id.*

134. *Id.* at 425, 739 A.2d at 96.

presented a "class-biased and one-sided picture of prostitution" containing inferences and innuendoes.[135]

Her opinion, however, misses the mark. The court presented an objective survey of prostitution based on the authorities of the time period in which the law was drafted.[136] The court's use of these authorities was necessary to arrive at an understanding of views among lawmakers and reformers of that time, not the present.[137] Writing from a perspective of feminists and prostitutes of the latter part of the twentieth century, as Judge Raker suggests,[138] would not provide the necessary contextual background for analysis of legislative intent at the time the law was enacted. Although the court's detailed historical account of prostitution was excessive, it was presented without bias and for the appropriate purpose of ascertaining the intent of the General Assembly in 1920.[139]

The court had the task of interpreting section 15(e) because the General Assembly did not draft the statute clearly. Maryland's section 15(e), unlike statutes that separate treatment of prostitutes and their patrons, attempts to encompass the behavior of all participants under a single subsection addressing one activity.[140] Therefore, the meaning of the statute turned entirely on the meaning of the single unclear term "solicit."[141] Had the court found that term to have the ordinary meaning of only applying to one who is a seller of a commodity, it would have been left in the difficult predicament of finding another ground on which to enforce the statute against the customer. The court, instead, delved into deep historical research to support an application of the statute that was not as clear as it should or could have

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135. *Id.* (quoting ROSEN, *supra* note 88, at xiii).

136. Although the majority used the work of some contemporary historians to support its historical analysis, much of the authority that the majority provided were sources of the time period. The majority cited, for example, the Maryland Vice Commission Report, Vol. 4, at 1 (1915), as well as the 1917-1924 Report of the Board of Police Commissioners for the City of Baltimore, and H. Woolston, *Prostitution in the United States* (1921).

137. *See McNeil*, 356 Md. at 403-04, 739 A.2d at 84 (stating that the court's goal in interpreting statutory language "is to discern and effectuate the intent of the legislature at the time it enacted the statute").

138. *Id.* at 425, 739 A.2d at 96 (Raker, J., concurring).

139. *See In re* Adoption No. 12612, 353 Md. 209, 233, 725 A.2d 1037, 1049 (1999) (stating that the goal in statutory interpretation is to ascertain the intent of the legislature at the time it enacted the law).

140. MD. ANN. CODE. art. 27, § 15(e) (1999); *see also supra* note 2 (quoting the language of section 15(e), which does not distinguish between the behavior of the prostitute and the customer).

141. *McNeil*, 356 Md. at 419-23, 739 A.2d at 93-95.

been.[142] The General Assembly would be wise to amend the language of section 15 to clarify that certain activities of the prostitute are illegal, and similarly, certain activities of the patron are criminal.

b. Maryland's Criminalization of Potential Customers of Prostitutes Provides for Equal Treatment Under Section 15(e).—By holding that the crime of soliciting for the purposes of prostitution was intended to apply to both prostitutes and potential customers, the Court of Appeals takes a step toward equitable prosecution of those responsible for prostitution.[143] For most of this century, the focus of law enforcement in fighting the crime of prostitution has been on the prostitute.[144] The court's decision reiterates Maryland's commitment to equal treatment of all parties who engage in the crime of prostitution.[145]

Maryland's recognition of the criminality of customer solicitation creates a new stigma for the prosecuted customers.[146] Due to the history of unequal enforcement of anti-prostitution laws, society has mainly vilified the prostitute as the criminal.[147] Now, by punishing the soliciting customer, maintaining anonymity will be more difficult for the john.[148] To compensate for years of unequal treatment, communities in Maryland might consider more drastic techniques to discourage potential customers from soliciting prostitutes.[149] Pennsylvania, for example, has resorted to publishing the names of any person twice found guilty of patronizing a prostitute.[150] Other

142. *See id.* at 405-19, 739 A.2d at 85-92 (tracing the history of prostitution laws in Maryland and the United States).

143. *Id.* at 420, 739 A.2d at 93-94.

144. *See* Lefler, *supra* note 42, at 12-16 (arguing that, historically, the criminal justice system has vilified the female prostitute, while leaving the customer essentially blameless).

145. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 569 (2000) (arguing that imposing sanctions on customers of prostitutes helps the general cause of gender equality).

146. *Cf.* Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1536-38 (1996) (describing the various shame punishments used by states to discourage prostitutes' patrons from engaging in criminal behavior).

147. *Cf.* Lefler, *supra* note 42, at 12-16 (discussing the justice system's initial attempts to suppress prostitution by imposing criminal penalties on the prostitute and not on the customer).

148. *Cf. id.* at 22 (arguing that punishing the behavior of johns will expose them to the "embarrassment of arrest or other punitive measures").

149. *See id.* at 26-34 (describing the various measures taken by communities to specifically target the behavior of johns).

150. PA. STAT. ANN. tit. 18, § 5902(e) (West 1996); Persons, *supra* note 146, at 1536 ("Pennsylvania stands alone in its statutory prescription of a mandatory shame punishment for prostitutes' patrons . . . .").

jurisdictions punish customers of prostitution by impounding their cars, revoking their driver's licenses, or requiring them to attend seminars.[151] Such deterrence tactics may abruptly reverse the trend of unequal enforcement of anti-prostitution laws and have the effect of bringing gender equality to Maryland's anti-prostitution efforts.[152]

Moreover, the safety of both prostitutes and their clients will likely improve because of the gender-neutral application of section 15(e). Prostitution is a dangerous profession.[153] Studies show that prostitutes are frequently victims of sexual assault and that sixty-five percent of prostitutes have been seriously injured by a customer.[154] According to one study, the mortality rate among prostitutes is forty times the national average.[155] Customers of prostitutes suffer from the crimes of the prostitute as well.[156] By applying section 15(e) to the entire pool of participants, the law will have a greater preventative effect and therefore protect both the prostitute and patron.

By making potential customers criminally responsible for their acts of solicitation, Maryland joins many states that already provide for equal treatment of prostitutes and johns.[157] For example, Connecticut, Idaho, Indiana, Massachusetts, and Texas all have statutes provid-

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151. *See, e.g.*, CAL. PENAL CODE § 647 (West Supp. 1998) (allowing for suspension of a patron's driver's license); CONN. GEN. STAT. § 53a-83(a) (West Supp. 1997) (providing for car forfeiture); Lefler, *supra* note 42, at 31-32 (discussing a San Francisco program that allows johns to keep their record clean by attending a seminar and paying a fine); Law, *supra* note 145, at 567-68 (discussing such statutes as an example of one feminist perspective that advocates focusing anti-prostitution efforts on imposing criminal penalties on those who offer to pay for sex).

152. *See* Lefler, *supra* note 42, at 26-34 (discussing the justice system's use of programs targeting johns to reverse the trend of unequal enforcement of prostitution-related crimes); *see also* Law, *supra* note 145, at 569 (arguing that although the new enforcement mechanisms directed toward customers will not likely end prostitution, they might help the general cause of gender equality).

153. *See* Jessica Drexler, Comment, *Government's Role in Turning Tricks: The World's Oldest Profession in the Netherlands and the United States*, 15 DICK. J. INT'L L. 201, 229-31 (1996) (discussing the prevalence of crimes in the lives of prostitutes). Drexler argues that because of the nature of their trade, prostitutes are inherently susceptible to crime and violence. *Id.* at 229. "Prostitutes suffer frequent sexual assaults . . . because of the high crime areas in which they work." *Id.* Drexler further notes that prostitutes are at greater risk of contracting HIV because the virus is more likely transmitted from a man to a woman. *Id.* at 226.

154. *Id.* at 229-30 (citing Deborah L. Rhode, *Who is the Criminal?*, NAT'L L.J., Sept. 25, 1995, at A22).

155. *Id.* at 229.

156. *Id.* at 230.

157. *See* Lefler, *supra* note 42, at 18 (preferring the approach of many states that treats prostitutes and johns with full equality).

ing for the identical treatment of prostitutes and their customers.[158] As they do in these states, courts should impose equal statutory penalties for all offenders, buyers or sellers, because the language of section 15(e) does not refer to the specific role one plays in "soliciting."[159] The ultimate effect of the ruling in *McNeil* is a prohibition of gender-biased prosecution and punishment of those who participate in the business of sex for hire.

c. The Court's Ruling Will Provide for Efficient Enforcement of Section 15(e).—By ruling that the police officers had probable cause to arrest McNeil as a potential customer, the court also set a precedent that will allow for efficient enforcement of the criminal law.[160] Under the facts of *McNeil*, the police need only meet a low standard to establish probable cause in an arrest for soliciting for the purposes of prostitution.[161] For McNeil's arrest, it was enough for police to provide evidence that McNeil made reference to a sexual act and that he "expected to pay for the service."[162] No money changed hands, and no sexual acts were performed.[163] In fact, there was very limited interaction between McNeil and the woman he thought was a prostitute.[164]

The facts of *McNeil* used as a benchmark for probable cause will likely enable law enforcement agencies to demonstrate, rather easily, that an arrest was proper under section 15(e).[165] There need not be

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158. CONN. GEN. STAT. §§ 53a-82 & 53a-83 (1999); IDAHO CODE §§ 18-5613 & 18-5614 (Michie 2000); IND. CODE ANN. §§ 35-45-4-2 & 35-45-4-3 (Michie 2000); MASS. ANN. LAWS ch. 272, § 53A (Law. Co-op. 2000); TEX. PENAL CODE ANN. § 43.02 (West 2000).

159. Under Title 27, section 17, all violations of section 15 carry the same penalty. MD. ANN. CODE tit. 27, § 17 (1999).

160. *See McNeil*, 356 Md. at 423, 739 A.2d at 95 (holding that McNeil's interaction with Officer Giblin was sufficient for the officer to have probable cause to believe that McNeil had solicited for the purpose of prostitution).

161. *See id.*

162. *Id.*

163. *Id.* at 399, 739 A.2d at 82.

164. *See id.*

165. *Id.* There may be reason for concern over whether the court has set the standard for probable cause too low. The holding criminalizes the offer or enticement to engage in a sexual act coupled only with some expectation of payment. *Id.* at 423, 739 A.2d at 95. The court's opinion indicated that Officer Giblin merely had to hear McNeil's request for sex and a vague reference to compensation in order to establish "probable cause to believe that McNeil had just solicited her to commit an act of prostitution." *Id.* In effect, the court upheld an arrest for soliciting prostitution based on indirect evidence of payment expectation. *Id.* The only reference that McNeil made to payment was a request for "half and half" after Officer Giblin indicated that she was "working." *Id.* at 399, 739 A.2d at 82. Law enforcement agents may view this as a license to violate the due process rights of those whom they perceive to expect to pay for sex. Any indirect indication of some payment expectation when an offer for sex is made could lead to an arrest with probable cause. Questions could be raised about whether reaching into one's pocket or an offer to dinner

any discussion of money exchange for a valid arrest with probable cause.[166] Equipped with this standard to show probable cause, police departments can now aim their enforcement efforts toward the source of money in the sex trade.[167] Law enforcement agencies will recognize the potential fruitfulness in targeting the customer as well as the seller in sting operations.[168] More frequent arrests of potential customers will likely lessen the demand for the service the prostitute offers and decrease the economic incentive for other prostitutes to enter the market.[169]

5. Conclusion.—By interpreting the crime of soliciting for the purpose of prostitution as applying to potential customers of prostitutes, the Court of Appeals correctly identified and carried out the intent of the General Assembly, despite the equivocal wording of section 15. Extending criminal liability to prostitutes and their customers is a step toward achieving equal treatment of all who participate in the crime of prostitution. As police departments target a broader base of potential violators of section 15(e), enforcement efforts will likely be more effective and comprehensive. Further, the low standard of probable cause for a customer violation of section 15(e) allows for improved efficiency of the law's enforcement.

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constitutes payment expectation. Although these examples probably would not lead to an arrest, the court should have been more wary of the consequences of such a low standard. *Cf.* Ford v. United States, 498 A.2d 1135, 1137-38 (D.C. 1985) (finding probable cause for an arrest for solicitation where a prostitute was repeatedly waving down male motorists and approaching male pedestrians although there was no proof that the prostitute spoke words of solicitation); People v. Smith, 378 N.E.2d 1032, 1036 (N.Y. 1978) (finding probable cause to arrest the defendant even though the arresting officers did not overhear direct solicitation).

166. *McNeil*, 356 Md. at 423, 739 A.2d at 95.

167. *Id.* at 420, 739 A.2d at 93.

168. *Cf.* Lefler, *supra* note 42, at 19 (arguing that criminal enforcement efforts against prostitution will improve when the legal system focuses its enforcement approach on the john as well as the prostitute).

169. *Cf.* Persons, *supra* note 146, at 1574 (recognizing that when enforcement efforts are focused on the john, the demand for prostitution often decreases).

VI. CRIMINAL PROCEDURE

A. *Maryland Rejects Public School Students' Expectation of Privacy in Their Lockers*

In *In re Patrick Y.*,[1] the Court of Appeals considered whether the search of a public school student's locker violated his Fourth Amendment protection against unreasonable search and seizure.[2] The court concluded that the student did not have a reasonable expectation of privacy in his locker despite a school policy that required probable cause to initiate a locker search.[3] Rather than relying on the school's policy, the court based its holding on a state statute that permits school officials to search lockers without probable cause or reasonable suspicion as they would any other school property.[4] While a school's right to search student lockers under appropriate circumstances is reasonable and often necessary,[5] the court's finding that the expectation of privacy created by the school's published policy can be negated by an ambiguous state statute was improper.[6] In so holding, the court used flawed reasoning that ultimately led to an unfair result and unnecessarily severe consequences.

1. The Case.—Patrick Y. was an eighth grade student at the Mark Twain School in Montgomery County, Maryland.[7] The school is a public middle and senior high school with approximately 245 chil-

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1. 358 Md. 50, 746 A.2d 405 (2000).

2. *Id.* at 54, 746 A.2d at 407. The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3. *Patrick*, 358 Md. at 67, 746 A.2d at 414; *see infra* note 10 and accompanying text (describing the Montgomery County Public School system's search and seizure policy, as adopted by the Mark Twain School).

4. *Patrick*, 358 Md. at 62-63, 746 A.2d at 412. The court relied on MD. CODE ANN., EDUC. § 7-308 (1999), treating student lockers as part of the physical plant of the school, which may be searched at any time without probable cause or individualized suspicion).

5. In *Skinner v. Railway Labor Executives' Ass'n*, the United States Supreme Court explained that the constitutionality of a governmental search is measured by balancing the intrusiveness of the search against the promotion of legitimate governmental interests. 489 U.S. 602, 619 (1989). In *Vernonia School District 47J v. Acton*, the Court explained that "special needs," including the maintenance of order and discipline, exist in the public school context. 515 U.S. 646, 653 (1995).

6. *But see Patrick*, 358 Md. at 63, 746 A.2d at 412 (characterizing the language of section 7-308 as "plain"); *id.* at 66-67, 746 A.2d at 414 (explaining that a county school policy cannot take precedence over a statute when the two are conflicting).

7. *Id.* at 52, 746 A.2d at 406.

dren who have significant social, emotional, learning, and behavioral problems.[8] The Mark Twain School published a set of "Policies Regarding Student Behavior" given to all students, which Patrick and his parents received and signed.[9] This set of policies states that school officials may conduct searches of students' lockers if they have probable cause to believe that the locker contains weapons, drugs or drug paraphernalia, beepers, or electronic signaling devices.[10]

On the morning of May 23, 1997, Patrick Rooney, the Mark Twain School's security officer,[11] received information that "there were drugs and or weapons in the middle school area of the school," but he could not recall the source of the information.[12] Rooney informed the principal of the school, who then authorized a search of every locker in the middle school area.[13] Thereafter, Rooney, with the assistance of another individual, searched the middle school lockers.[14] Patrick was not present and did not consent to the search of his locker.[15]

When Rooney searched Patrick's locker, he found a backpack, which he also searched.[16] In the bag, he found a folding knife with a two-and-one-half-inch blade, a packet of rolling papers, and a pager.[17] Rooney then went to find Patrick, who was being restrained by school

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8. *Id.*

9. *Id.*

10. *Id.* at 52-53, 746 A.2d at 406-07. The school policy states that the school is "committed to maintain a safe environment for students and staff." *Id.* at 52, 746 A.2d at 406 (internal quotation marks omitted) (quoting the Mark Twain School's Policies Regarding Student Behavior). The policy further advises:

> Mark Twain subscribes to Montgomery County Public Schools' Search and Seizure policy, which provides that the principal or the administration's designee may conduct a search of a student or of the student's locker if there is probable cause to believe that the student has in his/her possession an item, the possession of which constitutes a criminal offense under the laws of the State of Maryland. These items include weapons, drugs or drug paraphernalia, alcohol, beepers and electronic signaling devices.

Id. at 52-53, 746 A.2d at 406-07 (quoting the Mark Twain School's Policies Regarding Student Behavior).

11. At the time of the search, Patrick Rooney was acting in his capacity as a school security officer. Brief of Petitioner at 2, *Patrick* (No. 27).

12. *Patrick*, 358 Md. at 53, 746 A.2d at 407 (internal quotation marks omitted).

13. *Id.*

14. *Id.* The record did not reveal any further details on the search. *Id.* It did not disclose how many lockers were searched, how the searches were conducted, or how the lockers were opened. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; *In re* Patrick Y., 124 Md. App. 604, 607, 723 A.2d 523, 525 (1999).

personnel as a result of an unrelated incident.[18] When confronted with the knife and pager, Patrick admitted that they belonged to him.[19] School officials then called the police.[20]

At an adjudicatory hearing, Patrick moved to suppress the evidence found in his locker, arguing that the search was not based on probable cause as specified in the school's policy.[21] The District Court of Maryland, sitting as a juvenile court in Montgomery County, found Patrick to be a delinquent child because he had a deadly weapon and pager on school property.[22] The trial court rejected Patrick's claim that the seizure of the items violated his Fourth Amendment rights.[23] The Court of Special Appeals affirmed.[24] Patrick appealed that decision, and the Court of Appeals granted certiorari to consider whether the search of Patrick's locker violated his Fourth Amendment rights.[25]

2. Legal Background.—

a. Search and Seizure Under the Fourth Amendment.—The Fourth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment,[26] prohibits unreasonable searches and seizures by the government.[27] The United States Supreme Court has determined that the constitutionality of any search ultimately rests on the reasonableness of the search under the circumstances.[28] The determination

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18. *Patrick*, 124 Md. App. at 607, 723 A.2d at 525. Patrick had threatened to leave the school building without permission and was being restrained for this reason. *Patrick*, 358 Md. at 53, 746 A.2d at 407.

19. *Patrick*, 124 Md. App. at 607, 723 A.2d at 525.

20. *Id.*

21. *Id.* at 608, 723 A.2d at 525.

22. *Patrick*, 358 Md. at 52, 746 A.2d at 406.

23. *Id.*

24. *Patrick*, 124 Md. App. at 613, 723 A.2d at 528 (holding that Patrick's privacy interest in his locker was outweighed by the school's need to maintain order and protect other students).

25. *Patrick*, 358 Md. at 54, 746 A.2d at 407.

26. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the search and seizure clause of the Fourth Amendment into the Fourteenth Amendment by holding that any evidence obtained in violation of the Fourth Amendment was inadmissible in a state court).

27. U.S. CONST. amend. IV. According to the Supreme Court in *Katz v. United States*, a search occurs, and therefore the Fourth Amendment is implicated, when the government violates an individual's "actual (subjective) expectation of privacy" and that expectation is "one that society is prepared to recognize as 'reasonable.'" 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

28. Terry v. Ohio, 392 U.S. 1, 27 (1968) (permitting police to stop and frisk individuals on less than probable cause when they reasonably fear for the safety of others because they

of reasonableness entails "balancing the need to search against the invasion which the search entails."[29]

While searches and seizures are generally unreasonable in the absence of a warrant or probable cause,[30] courts have affirmed the legality of searches and seizures that were not based on probable cause.[31] In situations where the court finds the government interest compelling, a general standard of reasonableness is applied.[32]

b. The Supreme Court's Application of the Fourth Amendment to Public Schools.—

(1) The Supreme Court Recognizes Students' Constitutional Rights.—Once the Supreme Court determined that public school students, as citizens of the United States, were entitled to constitutional protections,[33] it was forced to define the scope of these rights. One of

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suspect that the detainee may be armed, and explicitly invoking the reasonableness clause of the Fourth Amendment over the warrant clause as the governing standard).

29. Camara v. Mun. Court, 387 U.S. 523, 536-37 (1967) (applying a balancing test to uphold a relaxed probable cause standard in building inspections for housing code violations).

30. *See, e.g.*, Payton v. New York, 445 U.S. 573, 586 (1980) ("[S]earches and seizures inside a home without a warrant are presumptively unreasonable."); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (finding a Border Patrol search of a vehicle unconstitutional for lack of probable cause).

31. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."); *Camara*, 387 U.S. at 538-39 (permitting the use of a lower standard for ascertaining whether probable cause exists to conduct an "area inspection" for housing code violations than the standard used to measure probable cause in criminal cases).

32. Many "special needs" exceptions arise in situations in which the warrant and probable cause requirements are impractical. In such situations, courts typically uphold the search or seizure as long as it can be shown that the search or seizure furthered a compelling governmental interest. *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 633-34 (1989) (upholding a federal regulation authorizing random drug tests of railroad employees without "a warrant or reasonable suspicion that any particular employee may be impaired" on the basis that public safety interests are paramount in the context of rail transportation); O'Connor v. Ortega, 480 U.S. 709, 721-25 (1987) (permitting government employers to conduct "legitimate work-related, non-investigatory intrusions as well as investigations of work-related misconduct" without meeting the probable cause standard); United States v. Martinez-Fuerte, 428 U.S. 543, 557-59 (1976) (upholding United States Border Patrol's right to stop vehicles at permanent border checkpoints and question motorists without individualized suspicion, because the governmental and public interest in maintaining such stops outweighs the consequent intrusion on citizens' Fourth Amendment rights).

33. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In *Barnette*, the Court held that a resolution passed by West Virginia's Board of Education, requiring all public school students to salute the flag and recite the pledge of allegiance, violated the Fourteenth Amendment. *Id.* at 642. In support of this conclusion, the Court declared:

the first cases to address the issue was *Tinker v. Des Moines Independent Community School District.*[34] *Tinker* involved a group of principals in Des Moines, Iowa, who created a policy to suspend students who wore, and refused to remove, black armbands in protest of the Vietnam War.[35] The Court recognized the critical balance that must be struck between a student's constitutional rights and the school's interest in maintaining order and discipline.[36] It therefore applied a reasonableness standard and found that in order for the school action to be reasonable, there must be some proof of an actual threat of interference with school functions.[37] Perhaps most importantly, the Supreme Court asserted for the first time that students do not "shed their constitutional rights . . . at the schoolhouse gate."[38]

After recognizing that students are guaranteed constitutional rights just like other citizens, the Supreme Court began to shift the balance in favor of the schools' interest in maintaining order.[39] In *Goss v. Lopez,*[40] the Court recognized the need for school administrations to act quickly in taking disciplinary actions.[41] The Court held that the Due Process Clause requires that students receive some form of notice before they are suspended unless they pose a danger to

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> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. at 637.

34. 393 U.S. 503, 514 (1969) (holding that a school district's ban of black armbands worn by students in protest of the Vietnam War was an unconstitutional violation of students' First Amendment rights).

35. *Id.* at 504.

36. *See id.* at 506, 507 (explaining that students retain their constitutional rights while in school, but also recognizing "the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools").

37. *Id.* at 513-14.

38. *Id.* at 506 (referring specifically to the "freedom of speech or expression").

39. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661-62 (1995) (finding that a school's interest in deterring drug use was sufficiently "compelling" to affirm the constitutionality of random urinalysis of student athletes in public schools when increasing student drug use had led to disciplinary problems); New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (recognizing that the "substantial interest" of school officials in maintaining order in schools requires flexibility in disciplinary procedures, especially in light of the "particularly ugly forms" that school disorder has taken in recent years).

40. 419 U.S. 565 (1975).

41. *Id.* at 580.

other students, property, or the educational process, in which case no notice is required.[42]

(2) The Supreme Court Addresses Search and Seizure in Public Schools.—

(i) New Jersey v. T.L.O.*: The Application of the Two-Pronged Reasonableness Test.*—The first Supreme Court case to lay out a specific standard to determine reasonableness in school search cases was *New Jersey v. T.L.O.*[43] The Court applied a two-fold inquiry in which it first considered whether the action was justified at its inception, and second, whether the search was reasonably related in scope to the circumstances that initially justified it.[44]

In *T.L.O.*, a teacher found two female high school students smoking in the bathroom in violation of school rules and took them to the principal's office.[45] When questioned by the vice principal, T.L.O. denied that she had been smoking and claimed that she did not smoke at all.[46] The vice principal then opened her purse and found a package of cigarette rolling papers.[47] Because of the common association between such papers and the use of marijuana, he searched the purse further.[48] The search revealed a small quantity of marijuana and other evidence implicating T.L.O. in drug dealing.[49] T.L.O. later confessed that she had been selling marijuana at the high school.[50] The State of New Jersey brought delinquency charges against her, and she moved to suppress the evidence, claiming that the search was unlawful.[51]

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42. *Id.* at 581-82.

43. 469 U.S. 325, 341 (1985).

44. *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). This test is derived from *Terry*, in which the Court permitted police officers to conduct stops and frisks on less than probable cause, invoking the reasonableness clause over the warrant clause as the governing standard. *Terry*, 392 U.S. at 20; *see supra* note 28 (describing the circumstances under which police officers are permitted to conduct a *Terry* "stop-and-frisk").

45. *T.L.O.*, 469 U.S. at 328.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 329.

51. *Id.* T.L.O. claimed that the search of her purse violated her Fourth Amendment rights and moved to suppress the evidence uncovered during the search, as well as her confession. *Id.* The juvenile court found no Fourth Amendment violation and denied the motion to suppress, concluding that the search was reasonable and necessary to maintain discipline and order. *Id.* (quoting *In re* T.L.O., 428 A.2d 1327, 1333 (N.J. 1980)). The appellate court affirmed the trial court's finding that there was no Fourth Amendment violation, but remanded on the issue of whether T.L.O. had knowingly waived her Fifth

The Supreme Court set forth a two-pronged test to determine the reasonableness of a search of a student conducted by a school official.[52] The first inquiry determines whether the search was justified at its inception.[53] The Court stated that the initiation of a search of a student by a school official will be justified when there are reasonable grounds to suspect that the search will turn up evidence that the student has violated the law or a school rule or policy.[54] If reasonable suspicion exists to initiate a search, the second prong of the analysis examining the scope of the search is triggered.[55] The Court found that a search's scope is permissible "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[56]

The Court determined that, under this standard, the search of T.L.O.'s purse was reasonable and therefore did not violate her Fourth Amendment rights.[57] The report that T.L.O. had been smoking justified the initiation of the search.[58] The discovery of rolling papers in T.L.O.'s purse created a reasonable suspicion that the purse contained marijuana, which justified further exploration.[59]

Although the Court in *T.L.O.* specified that its decision did not address whether students have a legitimate expectation of privacy in lockers,[60] or "standards . . . governing searches of such areas,"[61] the Court held that students do have legitimate expectations of privacy in the items that they bring with them to school.[62] This privacy interest must be balanced against "the substantial interest of teachers and ad-

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Amendment rights before confessing. *Id.* at 330 (citing *T.L.O.*, 448 A.2d at 493)). The Supreme Court of New Jersey held that T.L.O.'s Fourth Amendment rights were violated, and reversed the appellate decision, ordering suppression of the evidence found in T.L.O.'s purse. *See id.* at 330-31 (referring to *T.L.O.*, 463 A.2d at 942, 944).

52. *Id.* at 341-42.

53. *Id.* at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).

54. *Id.* at 341-42. The Court noted: "We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities." *Id.* at 342 n.8.

55. *Id.* at 341.

56. *Id.* at 342.

57. *Id.* at 343.

58. *Id.* at 345.

59. *Id.* at 347.

60. *Id.* at 337 n.5.

61. *Id.*

62. *Id.* at 339 (noting that "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds").

ministrators in maintaining discipline in the classroom and on school grounds."[63]

(ii) Vernonia School District 47J v. Acton*: The Supreme Court Upholds a Group Search Lacking Individualized Suspicion.*—Ten years after *T.L.O.*, the Supreme Court was faced with another case involving a different type of student search—random urinalysis of student athletes.[64] In *Acton*, the Court applied the *T.L.O.* reasonableness test and balanced the students' privacy interests against the school's need to prevent student drug abuse.[65] Focusing on the importance of deterring drug use in schools, the Supreme Court justified an intrusion on privacy rights far greater than that of *T.L.O.*[66]

In response to increasing concern among parents and teachers about student-athlete drug use, the Vernonia School District created a policy under which all students participating in athletics were required to consent to urinalysis.[67] Acton was not permitted to participate in his school's football program after he refused to consent to the testing.[68] Acton, along with his parents, then filed suit, claiming that the policy violated the Fourth and Fourteenth Amendments to the United States Constitution, and Article I, section 9 of the Oregon Constitution.[69] The District Court dismissed the action,[70] but the

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63. *Id.* The Court stressed the importance of schools' need to maintain order and enforce disciplinary procedures:

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly admissible if undertaken by an adult.

Id. (citation omitted).

64. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648 (1995).

65. *Id.* at 652-64.

66. *Id.* at 660-64. For a critique of the Supreme Court's decision in *Acton*, see Steven J. Poturalski, Note, Vernonia School District 47J v. Acton: *The Decimation of Public School Students' Fourth Amendment Rights*, 27 U. TOL. L. REV. 505, 506, 536-40 (1996) (arguing that, by removing the individualized suspicion requirement and lowering the standard for a "compelling government interest," *Acton* allows schools to conduct suspicionless searches in the name of discipline and ultimately diminishes students' constitutional rights).

67. *Acton*, 515 U.S. at 648-50. Before adopting a drug testing policy, the Vernonia School District held a parent "input night" to discuss the proposed program. *Id.* at 649-50. The parents who attended expressed unanimous approval of the policy. *Id.* at 650.

68. *Id.* at 651.

69. *Id.* at 651-52.

70. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1368 (D. Or. 1992).

United States Court of Appeals for the Ninth Circuit reversed, holding that the policy violated Acton's constitutional rights.[71]

After granting certiorari, the Supreme Court applied the two-pronged reasonableness test articulated in *T.L.O.*[72] The Court determined that the testing, which constituted a search under the Fourth Amendment, was constitutional.[73] In analyzing whether the drug test was reasonable at its inception, the Court concluded that student athletes have an especially low expectation of privacy, evidenced by the school requirements of physical examinations and certain vaccinations, the communal characteristics of public school locker rooms, and the voluntary nature of school athletics.[74] To reach its conclusion that the tests were reasonable in scope, the Court determined that the search was relatively unobtrusive, and the severity and immediacy of the problem justified placing the legitimate governmental interest above the comparatively slight personal intrusion.[75]

c. Case Law Involving Locker Searches from Other Jurisdictions.— Although the Court in *T.L.O.* specified that its decision did not address the issue of locker searches,[76] many courts have applied the *T.L.O.* reasonableness test in cases involving locker searches and have reached different results regarding student privacy expectations.[77] Courts that have examined the issue, however, have consistently looked to the published school policy to determine whether the student had a reasonable expectation of privacy in his locker.[78]

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71. Vernonia Sch. Dist. 47J v. Acton, 23 F.3d 1514, 1527 (9th Cir. 1994).

72. *Acton*, 515 U.S. at 648; *see supra* notes 52-56 and accompanying text (describing the two-pronged test for assessing the reasonableness of searches in schools).

73. *Acton*, 515 U.S. at 652, 664-65.

74. *Id.* at 657. The Court noted that "[l]egitimate privacy expectations are even less with regard to student athletes. . . . Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.* (citing Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 627 (1989)).

75. *Id.* at 660-64. In support of its conclusion that the intrusiveness of student-athlete drug testing was justified, the Court pointed to the disciplinary and educational difficulties associated with increasing drug use by students:

> [T]he effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. . . . [T]he necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon the children for whom it has undertaken a special responsibility of care and direction.

Id. at 662.

76. New Jersey v. T.L.O., 469 U.S. 325, 337 n.5 (1985).

77. *See infra* notes 79-89 and accompanying text.

78. *See infra* notes 79 & 84 and accompanying text.

Several courts have held that students have no legitimate expectations of privacy in their lockers.[79] Many of these cases involved school policies that informed students that their lockers were subject to search at any time. For example, in *In re Isiah B.*,[80] a Wisconsin case, the published school policy specified that lockers were the property of the school and that searches could be conducted for any reason, at any time, and without a warrant.[81] Similarly, in *Shoemaker v. State*,[82] a Texas school communicated to students that lockers were subject to search at anytime based on "reasonable cause."[83]

Other courts have concluded that students do have a reasonable expectation of privacy in their lockers.[84] Some of these cases, such as the Massachusetts case of *Commonwealth v. Snyder*,[85] involved clear

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79. *See, e.g.*, Zamora v. Pomeroy, 639 F.2d 662, 671 (10th Cir. 1980) (holding that where the school retained control of, and access to, all student lockers, school authorities need only have "reasonable cause or reasonable suspicion" to search lockers); S.A. v. State, 654 N.E.2d 791, 795 (Ind. Ct. App. 1995) (holding that a student did not have an expectation of privacy in his locker or its contents when the school policy provided a "reasonable suspicion" standard to initiate a search); People v. Overton, 229 N.E.2d 596, 598 (N.Y. 1967) (stating that, where a school kept records of locker combinations and regulated what items could be stored in lockers, students should have expected inspections by school authorities who were under a duty to search a locker if they believed it to contain an illegal item); Commonwealth v. Cass, 709 A.2d 350, 357 (Pa. 1998) (concluding that students possess only a minimal privacy expectation in their lockers when school policy states that a locker may be searched without warning if school authorities have a reasonable suspicion that the locker contains items that may pose a danger to other students); Shoemaker v. State, 971 S.W.2d 178, 182 (Tex. App. 1998) (finding that a student did not have a reasonable expectation of privacy in his locker when a school policy stated that school officials may conduct locker searches when they have reasonable cause to do so); *In re* Isiah B., 500 N.W.2d 637, 641 (Wis. 1993) (holding that a student had no reasonable expectation of privacy in his locker when school policy reserved the right to search lockers at any time and for any reason without prior notice).

80. 500 N.W.2d 637 (Wis. 1993).

81. *Id.* at 639 n.1.

82. 971 S.W.2d 178 (Tex. App. 1998).

83. *Id.* at 182 (quoting the Montgomery High School Student Handbook).

84. *See, e.g.*, Commonwealth v. Snyder, 597 N.E.2d 1363, 1366 (Mass. 1992) (concluding that, where school policy explicitly provided that students had the right not to have their "locker subjected to unreasonable search," those "students [had] a reasonable and protected expectation of privacy in their school lockers"); *In re* S.C. v. State, 583 So. 2d 188, 191-92 (Miss. 1991) (holding that, under the Mississippi state constitution, students have a reasonable expectation of privacy in their lockers) (citing MISS CONST. art. 3, § 23); *In re* Dumas, 515 A.2d 984, 985-86 (Pa. Super. Ct. 1986) (extending the Supreme Court's recognition in *T.L.O.* of students' legitimate expectation of privacy in items that they bring to school and put in their lockers); State v. Joseph T., 336 S.E.2d 728, 737 n.10 (W. Va. 1985) (upholding a school policy which stated that students "may reasonably expect that their lockers will not be searched unless appropriate school officials consider a search absolutely necessary to maintain the integrity of the school environment and to protect other students" (internal quotation marks omitted) (quoting the school's handbook)).

85. 597 N.E.2d 1363 (Mass. 1992).

school policies stating that students had the right not to have their lockers searched without reasonable suspicion.[86]

In the absence of a published school policy, many courts have still found a privacy interest in student lockers.[87] Holding that a search of a middle school student's locker was constitutional, the Supreme Court of Appeals of West Virginia upheld reasonableness as the governing standard for student locker searches in *State v. Joseph T.*[88] Without any discussion of school policy, the Supreme Court of Mississippi held in *In re S.C. v. State* that students have a privacy interest in lockers and that locker searches are subject to a standard of reasonableness, not probable cause.[89]

d. Maryland Statutory Law Governing Student Locker Searches.—Section 7-308 of the Maryland Code acknowledges that public school officials have the authority to search lockers.[90] In relevant part, the statute states:

> (b) *Authority to search school.*—(1) A principal, assistant principal, or school security guard of a public school may make a search of the physical plant of the school and its appurtenances including the lockers of students. (2) The right of the school official to search the locker shall be announced or published previously in the school.[91]

Moreover, the State Board of Education has adopted a bylaw, which constitutes an agency regulation that is consistent with section 7-308.[92]

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86. *See infra* text accompanying note 195 (describing the school policy in *Snyder*).

87. *See supra* note 84 (citing cases where courts have found that students have a legitimate expectation of privacy in school lockers).

88. *See Joseph*, 336 S.E.2d at 736 ("In so holding, we recognize the entitlement of public school children to security against unreasonable searches and seizures conducted by school authorities.").

89. 583 So. 2d 188, 191-92 (Miss. 1991).

90. MD. CODE ANN., EDUC. § 7-308 (1999).

91. *Id.* The statute also states:

> (a) *Authority to search student.*—(1) A principal, assistant principal, or school security guard of a public school may make a reasonable search of a student on the school premises or on a school-sponsored trip if he has a reasonable belief that the student has in his possession an item, the possession of which is a criminal offense under the laws of this State or a violation of any other State law or a rule or regulation of the county board.
>
> (2) The search shall be made in the presence of a third party.
>
> . . . .
>
> (c) *Rules and Regulations.*—The [State] Department [of Education] shall adopt rules and regulations relating to searches permitted under this section.

Id.

92. MD. REGS. CODE tit. 13A, § 08.01.14E & F (1999).

The policy contained in section 7-308 was originally codified in 1970 when the State Board of Education enacted bylaw 740, which dealt with searches on school premises.[93] This bylaw required that police officers obtain a search warrant to search school premises unless the search was necessary to prevent imminent danger to a person or property.[94] Student lockers were excluded from such searches unless otherwise specified in the warrant.[95] However, the bylaw allowed school officials to conduct searches for their own purposes absent a warrant, probable cause, or even individualized suspicion.[96]

In 1973, the General Assembly enacted the first state statute governing public school searches.[97] The statute, section 96A of the former Article 77 of the Maryland Code, drew a distinction between searches of students and searches of lockers.[98] Section 96A(a) allowed school officials to conduct searches of students if they had probable cause to believe that the student was in possession of contraband.[99] However, section 96A(b) permitted school officials to search the physical plant of the school, including students' lockers, but did not include either a standard of probable cause or reasonable suspicion.[100] While section 96A(a) was modified in 1982,[101] section 96A(b) has remained intact since 1973.[102] In 1990, the State Board of Education bylaw was amended so that it would be consistent with the 1982 change in section 96A(a).[103] Again, in 1997, the bylaw was amended to allow school officials to search students on school-sponsored trips under the same "reasonable belief" standard, and a provision was added to mirror the statute by allowing school officials to search lockers as part of the school's physical plant.[104]

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93. MD. STATE BD. OF EDUC. BY-LAW 740 (1970) (source not available in print).

94. *Id.*

95. *Id.*

96. *Id.*

97. MD. ANN. CODE art. 77, § 96A (1973).

98. *Id.*

99. *Id.* § 96A(a).

100. *Id.* § 96A(b).

101. 1982 Md. Laws 724. Section 96A(a) was modified to allow for searches of students when there is a reasonable belief, rather than the higher standard of probable cause, that the student is in possession of contraband. *Id.*

102. *Compare* MD. ANN. CODE art. 77, § 96A(b) (1973), *with* MD. CODE ANN., EDUC. § 7-308(b) (1999).

103. 17 Md. Reg. 20, 2430 (Oct. 5, 1990).

104. 24 Md. Reg. 6, 486 (Mar. 14, 1997).

e. Statutory Interpretation.—The primary goal in construing any statute is to realize the intent of the legislature.[105] A court will first look at the language of the statute itself, and if that language is unequivocal, the inquiry into legislative intent ordinarily ends.[106] Where the statutory language is clear, a court may not add or delete words to make a statute reflect an intent not evident in that language.[107] The language should not be construed in a way that limits or extends its intended application.[108]

If statutory language is ambiguous, courts may attempt to identify the purpose or objective behind a given statute.[109] Furthermore, each provision of the statute should be viewed in the context of the entire statutory scheme and not in isolation.[110] The statute should be interpreted to give every word effect, avoiding any constructions that render any portion of the language superfluous or meaningless.[111] When a statute is susceptible to more than one meaning, the court

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105. Bd. of County Comm'rs v. Bell Atlantic-Md., Inc., 346 Md. 160, 169, 695 A.2d 171, 176 (1997) (citing Klingberg v. Klingberg, 342 Md. 315, 327, 675 A.2d 551, 557 (1996); Kaczorowski v. Mayor of Baltimore, 309 Md. 505, 514-15, 525 A.2d 628, 632 (1987)). In *Bell-Atlantic*, the court reviewed legislative history to determine the intent of a statute and ultimately held that Bell Atlantic, Inc., fell within the definition of "owner" as used in Maryland's "Miss Utility Act." *Id.* at 169, 695 A.2d at 176.

106. *Bell Atlantic*, 346 Md. at 169, 695 A.2d at 176 (citing Polomski v. Mayor of Baltimore, 344 Md. 70, 74, 684 A.2d 1338, 1340 (1996); Scaggs v. Balt. W. R. Co., 10 Md. 268 (1856)); *see also Polomski*, 344 Md. at 84, 684 A.2d at 1344 (holding that because the language of the Maryland Workers' Compensation Act is clear and unambiguous, there is no need to look beyond the statute for its meaning).

107. *In re* Patrick A., 312 Md. 482, 487, 540 A.2d 810, 812 (1988) (citing Bridges v. Nicely, 304 Md. 1, 10-11, 497 A.2d 142, 147 (1985) (stating that where statutory language is clear, courts may not insert or omit words to create an intention not evidenced in the statute's original form).

108. Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 73, 517 A.2d 730, 732 (1986) (citing State v. Intercontinental, Ltd., 302 Md. 132, 137, 486 A.2d 174, 176 (1985); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 619, 458 A.2d 758, 770 (1983)). In *Tucker*, the court extended the statutory definition of "pedestrian" to include a parking attendant sitting in a booth, because it believed that such an interpretation was consistent with the goal of the statute even though contrary to a strict definition of the word. *Id.* at 80, 517 A.2d at 735.

109. *See Kaczorowski*, 309 Md. at 513, 525 A.2d at 632 (characterizing "the search for legislative intent as an effort to 'seek to discern some general purpose, aim, or policy reflected in the statute'" (quoting Melvin J. Sykes, *A Modest Proposal for a Change in Maryland's Statutes Quo*, 43 MD. L. REV. 647, 653 (1984))).

110. *Bell Atlantic*, 346 Md. at 178, 695 A.2d at 180 (citing Morris v. Osmose Wood Preserving, 340 Md. 519, 539, 667 A.2d 624, 634 (1995); City of Annapolis v. State, 30 Md. 112, 117 (1869)).

111. Warsame v. State, 338 Md. 513, 519, 659 A.2d 1271, 1273-74 (1995) (quoting GEICO v. Ins. Comm'r, 332 Md. 124, 132, 630 A.2d 713, 714 (1993)). In *Warsame*, the court held that a lack of strict compliance with a state statute listing controlled dangerous substances in Maryland through failure to annually update the list did not prevent prosecution. *Id.* at 525, 659 A.2d at 1277. The court found that the legislature had no duty to

should consider the consequences of each meaning and apply the interpretation that is most reasonable, logical, and in accordance with common sense.[112]

3. The Court's Reasoning.—In *In re Patrick Y.*, the Court of Appeals held that an eighth grade student, Patrick, did not have a reasonable expectation of privacy in his school locker.[113] Using the two-pronged analysis followed in *T.L.O.* and *Acton*, the court applied the first prong to determine whether Patrick had a reasonable expectation of privacy in his locker.[114] The majority found that a Maryland state statute had invalidated the local school's contrary policy, and therefore the policy could not provide Patrick with an expectation of privacy.[115] Because the majority found this state statute controlling, they did not address the second prong of the analysis.[116]

In determining whether Patrick had a reasonable expectation of privacy in his locker, the majority considered the school policy statement given to its students.[117] The majority noted that the assessment of a privacy expectation is fact-based and usually depends on the school or the school system's policy.[118] The Mark Twain School's policy stated that, in order to search a student's locker, a school official must have probable cause to believe that a student has a contraband

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annually update the list when the statute contained a provision which stated that any substance that was labeled controlled under federal law was also controlled in Maryland. *Id.*

112. *Kaczorowski*, 309 Md. at 513-14, 525 A.2d at 632 (quoting *Tucker*, 308 Md. at 75, 517 A.2d at 732).

113. *Patrick*, 358 Md. at 67, 746 A.2d at 414.

114. *Id.* at 60-63, 746 A.2d at 411-12; *see supra* notes 52-56 and accompanying text (discussing *T.L.O.*'s two-pronged analysis in greater detail).

115. *Patrick*, 358 Md. at 66-67, 746 A.2d at 414 (finding that the Mark Twain School's policy, which required probable cause as a basis for locker searches, was inconsistent with MD. CODE ANN., EDUC. § 7-308 (1999)); *see supra* note 10 (providing excerpted text from the Mark Twain School's Policies Regarding Student Behavior).

116. The second prong of the reasonableness analysis considers whether the search was reasonable in scope in light of the circumstances that justified its inception. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

117. *Patrick*, 358 Md. at 62, 746 A.2d at 412.

118. *Id.* at 60-61, 746 A.2d at 411. The majority cited several examples in which school policies regarding locker searches varied dramatically. In *In re Isiah B.*, 500 N.W.2d 637 (Wis. 1993), a school published a written policy stating that lockers were school property, and that periodic searches would be conducted without notice. *Id.* at 639. In light of this policy, the *Isiah* court ruled that students had no reasonable expectation of privacy in their lockers. *Id.* at 641. Conversely, in *Commonwealth v. Snyder*, 597 N.E.2d 1363 (Mass. 1992), where the school's policy stated that the students' lockers would not be searched without justification, the court found that students had a reasonable expectation of privacy. *Id.* at 1366.

item under the criminal law of the state.[119] The court recognized that this policy, "[o]n its face . . . could serve as a basis for an expectation that lockers [would] not otherwise be searched."[120] However, the court stated that section 7-308 of the Maryland Education Article, which defines and controls the authority of public school officials to search public school lockers, trumps an individual school's policy.[121]

As a result, the majority found that the Mark Twain School's policy regarding searches and seizures was inconsistent with section 7-308 and was therefore invalid.[122] Section 7-308 is divided into separate sections entitled "Authority to search student" and "Authority to search school."[123] According to the statute, the search of a student requires a reasonable belief that the student is in possession of contraband.[124] Student lockers, on the other hand, are characterized as part of the school and are distinguishable from a student's personal property.[125] Section 7-308 does not specify any standard for school officials to meet when searching the physical plant of the school, including lockers.[126] Therefore, the majority reasoned that school officials could search lockers as they would any other school property, and "[n]o probable cause [was] required; nor [was] any reasonable suspicion required."[127]

The court traced the origins and history of section 7-308 and its precursor, Board of Education Bylaw 740, to support its view that the legislature intended to allow for searches of student lockers in the absence of probable cause or reasonable suspicion.[128] Since 1973, when the policy was first codified as section 96A, neither probable cause nor

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119. *Patrick*, 358 Md. at 52-53, 746 A.2d at 407-08; *see supra* note 10 (providing the relevant text from the Mark Twain School's Policies Regarding Student Behavior).

120. *Patrick*, 358 Md. at 62, 746 A.2d at 412.

121. *Id.*; *see* MD. CODE ANN., EDUC. § 7-308 (1999); *supra* note 91 and accompanying text (providing the relevant text of section 7-308).

122. *Patrick*, 358 Md. at 66, 746 A.2d at 414; *see supra* note 10 (providing relevant text from the Mark Twain School's Policies Regarding Student Behavior).

123. MD. CODE ANN., EDUC. § 7-308.

124. *Id.* § 7-308(a)(1).

125. *Patrick*, 358 Md. at 63, 746 A.2d at 412-13.

126. *See id.*; *see also* MD. CODE ANN., EDUC. § 7-308 (b)(1) (stating that a school official "may make a search of the physical plant of the school and its appurtenances including the lockers of students").

127. *Patrick*, 358 Md. at 63, 746 A.2d at 413. The majority did not view section 7-308 as ambiguous; rather, it insisted that the statutory language and intent of the statute was clear, explaining that "[t]he plain words of the statute . . . establish a State policy distinguishing between the search of students and the search of lockers. . . . This policy is deliberate and has a long history." *Id.* at 63-64, 746 A.2d at 412-13.

128. *Id.* at 64-66, 746 A.2d at 413-14; *see supra* notes 93-104 and accompanying text (discussing the origins and development of MD. CODE ANN., EDUC. § 7-308).

individualized reasonable suspicion have been specified as a requirement for a search of student lockers by a school official for school purposes.[129] The court then emphasized that there has always been a clear distinction between searches of students and searches of lockers, whereby the lockers have always been treated as school property.[130]

Thus, the majority found that, because the Montgomery County policy requires probable cause for a locker search, it was inconsistent with section 7-308, which treats lockers as school property and does not require probable cause.[131] Reasoning that a county cannot adopt a policy that is inconsistent with state law, the majority found the Montgomery County policy invalid.[132] The majority concluded that because the school policy that Patrick and his parents had signed was invalid, it could not create a reasonable expectation of privacy, and therefore the search did not violate Patrick's Fourth Amendment rights.[133]

In his dissent, Chief Judge Bell focused on the notice that Patrick had received from the published school policy[134] and argued for a different interpretation of section 7-308 that would allow schools to adopt appropriate, individualized locker search standards.[135] Chief Judge Bell found that Patrick had a legitimate expectation of privacy in his locker based on the published school policy.[136] Looking to the cases cited by the majority, the dissent noted that "[t]he school policy is thus the standard against which to judge whether the petitioner's expectation of privacy was reasonable in light of the circum-

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129. *Patrick*, 358 Md. at 64-65, 746 A.2d at 413.

130. *Id.* at 64, 746 A.2d at 413.

131. *Id.* at 66, 746 A.2d at 414.

132. *Id.* The majority stated:

> A county board cannot adopt and enforce a policy affecting the operation of the public schools or the rights, privileges, or obligations of public school students that is inconsistent with public general law or with by-laws of the State Board of Education, which have the force of law. . . . Accordingly, that local policy is invalid and nugatory and cannot serve as a basis for a student to have a *reasonable* expectation of privacy in the locker provided by the school.

Id. (citing Wilson v. Bd. of Educ., 234 Md. 561, 200 A.2d 67 (1964); Bd. of Educ. v. Waeldner, 298 Md. 354, 470 A.2d 332 (1984)).

133. *Id.* at 66-67, 746 A.2d at 414.

134. *Id.* at 73-74, 746 A.2d at 419 (Bell, C.J., dissenting) (stating that "the critical issue is whether the petitioner could legitimately rely on the policy, and whether the policy could give rise to an expectation of privacy").

135. *Id.* at 77, 746 A.2d at 420.

136. *Id.* at 73, 746 A.2d at 418.

stances."[137] Based on this standard, Patrick's expectation of privacy was legitimate and reasonable under the circumstances.[138]

Chief Judge Bell also argued for an alternate reading of section 7-308, under which the Mark Twain School's policy would be consistent.[139] The dissent demonstrated that the majority's interpretation was flawed because it analyzed parts of the statute in isolation rather than viewing it in its entirety.[140] Because section 7-308(b)(1) does not specify a standard for the searching of the "physical plant" of the school, including lockers, one may infer that the standard to be applied in each school is left for determination by the individual school itself.[141] Chief Judge Bell also noted that because the language of the statute is "at best ambiguous,"[142] the court was required to choose the common sense reading—allowing different schools with different needs to determine what policy is best for them.[143] He further found that the statute neither specifies a state-wide standard nor prohibits the enforcement of school-specific policies.[144]

Finally, the dissent pointed out that while the majority insisted upon a literal interpretation of section 7-308(b)(1), it excused the Mark Twain School's lack of compliance with section 7-308(b)(2).[145] Patrick was never given notification of the Mark Twain School's absolute right to search his locker.[146] According to the dissent, this lack of notification alone should be sufficient, under a literal reading of the statute, to nullify the school's right to search.[147]

4. Analysis.—In *In re Patrick Y.*, the Court of Appeals found that a student did not have a reasonable expectation of privacy in his school locker, despite the school's published policy requiring probable cause to search lockers.[148] As Chief Judge Bell persuasively argued

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137. *Id.* at 75, 746 A.2d at 419 (citing New Jersey v. T.L.O., 469 U.S. 325, 338 (1985); Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)).

138. *Id.* at 73, 746 A.2d at 418.

139. *Id.* at 77-78, 746 A.2d at 420-21.

140. *Id.* at 77, 746 A.2d at 420 (suggesting that when section 7-308(b), which governs searches of the school's physical plant, is read in the context of section 7-308(a), which governs searches of students, section (b) can be fairly read as allowing individual schools to determine standards for conducting locker searches).

141. *Id.*

142. *Id.* at 76, 746 A.2d at 419.

143. *Id.* at 78, 746 A.2d at 420-21.

144. *Id.* at 78-79, 746 A.2d at 421.

145. *Id.* at 79, 746 A.2d at 421.

146. *Id.*

147. *Id.*

148. *Id.* at 66-67, 746 A.2d at 414; *see supra* note 10 (providing the text of the school policy, which purported to create a probable cause requirement for locker searches).

in his dissent, the majority's decision was flawed because it employed a literal and impractical interpretation of section 7-308, it failed to address the constitutional issues raised by the Mark Twain School's published policy on locker searches, and it disregarded case law focusing on school policies.[149] Consequentially, the majority's decision in *Patrick* drastically curtailed students' Fourth Amendment rights.

a. The Majority's Interpretation of Section 7-308 Is Not Consistent with the Rules of Statutory Construction.—Although the *Patrick* court found the "plain" words of section 7-308 to be clear,[150] the statute is actually ambiguous.[151] The majority interpreted section 7-308 to mean that school officials can search lockers "as they could any other school property," without probable cause or reasonable suspicion.[152] However, the majority disregarded an alternate interpretation of section 7-308—that the legislature intended schools to provide their own standards.[153] Principles of statutory construction require courts to consider any alternate interpretations.[154] When a statute is susceptible to more than one interpretation, the court should consider the consequences of each meaning and apply the interpretation that is most reasonable and logical.[155] The majority did not discuss any of the consequences of its interpretation, and it dismissed the possibility that the legislature intended for schools to determine their own stan-

149. *See Patrick*, 358 Md. at 68-79, 746 A.2d 415-21 (Bell, C.J., dissenting) (suggesting an alternative reading of section 7-308 under which the Mark Twain School's policy would be a sufficient basis on which the petitioner could establish an expectation of privacy in his school locker).

150. *Patrick*, 358 Md. at 63, 746 A.2d at 412.

151. *See id.* at 76, 746 A.2d at 419 (Bell, C.J., dissenting) (arguing that "giving the statute a plain reading demonstrates only that the language of the statute is at best ambiguous").

152. *Patrick*, 358 Md. at 63, 746 A.2d at 412-13.

153. *Id.* at 77-78, 746 A.2d at 420-21 (Bell, C.J., dissenting).

154. *See* Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 75, 517 A.2d 730, 732 (1986). The *Tucker* court stated that when a statute is "susceptible of more than one meaning . . . courts consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment." *Id.* (citing State v. Fabritz, 276 Md. 416, 348 A.2d 275 (1975); Height v. State, 225 Md. 251, 170 A.2d 212 (1961)).

155. *See id.* In *Tucker*, the court explained that when it attempts to ascertain the legislative intent behind an ambiguous statute, it "may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense" (citing Kindley v. Governor of Md., 289 Md. 620, 426 A.2d 908 (1981); B.F. Saul Co. v. West End Park, 250 Md. 707, 246 A.2d 591 (1968))); *see also Patrick*, 358 Md. at 78, 746 A.2d at 420-21 (Bell, C.J., dissenting) (arguing that an interpretation of section 7-308 that allows schools to determine their own standards for locker searches is consistent with common sense).

dards, stating that such a construction "would be wholly unreasonable."[156]

While the statute does not specify the standard that should govern locker searches, this omission does not logically lead to the conclusion that there is no standard at all. The statute simply states that schools have the authority to search lockers and that schools will inform students of this right prior to conducting such a search.[157] Clearly, lockers are treated differently from the rest of the physical plant of the school.[158] The fact that students must be informed of the school's right to search lockers, but not other parts of the school, indicates that school authorities have ceded some interest in the lockers to the students.[159] Therefore, the school's ownership of the lockers, unlike other parts of the physical plant, is not absolute.[160]

In addition to ignoring the ambiguity in section 7-308, the majority further ignored rules of statutory construction when it failed to consider the entire statutory scheme or explore the consequences of its construction in the decision.[161] When interpreting a statute, each provision should be considered in the context of the entire statutory scheme and not in isolation.[162] As Chief Judge Bell pointed out in his dissent, when section 7-308 is read in its entirety, the flaws in the majority's interpretation are exposed.[163] Because the statute does not specify a statewide standard to initiate a locker search, it can be in-

156. *Patrick*, 358 Md. at 67-68 n.2, 746 A.2d at 415 n.2.

157. MD. CODE ANN., EDUC. § 7-308(b)(1) (1999) states that school officials "may make a search of the physical plant of the school and its appurtenances including the lockers of students." Subsection (b)(2) states: "The right of the school official to search the locker shall be announced or published previously in the school."

158. Section 7-308(b)(1), which grants school officials the right to search the school, extends the right to "the physical plant of the school and its appurtenances" and makes special mention that student lockers are included. *Id.* § 7-308(b)(1). No other components of the school are mentioned with specificity.

159. *See id.* § 7-308(b)(1) & (2) (requiring school officials to announce or publish in the school a statement that school officials have the right to search a locker).

160. *See Patrick*, 358 Md. at 76, 746 A.2d at 419-20 (Bell, C.J., dissenting). In his dissenting opinion, Chief Judge Bell argued that if, as the majority suggested, section 7-308(b)(1) gives schools the unconditional right to search student lockers at any time, then there is no need for the provision in section 7-308(b)(2), which requires that students be given prior notice that their lockers are subject to search. *Id.* Consequently, Chief Judge Bell suggested that his interpretation was more consistent with the rules of statutory interpretation. *See id.* He stated: "It is well settled that a statute should not be interpreted so as to render any part of it meaningless, surplusage, superfluous, or nugatory." *Id.* at 76, 746 A.2d at 420 (citing Gordon Family P'ship v. Gar on Jer, 348 Md. 129, 138, 702 A.2d 753, 757 (1997); GEICO v. Ins. Comm'r, 332 Md. 124, 132, 630 A.2d 713, 714 (1993)).

161. *See id.* at 76-77, 746 A.2d at 420.

162. *See id.* at 77, 746 A.2d at 420 (citing Roberts v. Total Health Care, Inc., 349 Md. 499, 523, 709 A.2d 142, 154 (1998)).

163. *Id.*

ferred that it was meant to be left to the discretion of each school to determine which standard is best.[164] The only condition on this discretion is that each school announce its policy to its students prior to conducting a locker search.[165]

Furthermore, the majority ignores the fact that Patrick was not given the notice that section 7-308(b)(2) requires prior to the search.[166] Even if one accepts the court's construction of the statute that school officials have an unconditional right to search student lockers,[167] the search still must be invalidated on the grounds that students were not properly notified.[168] If, as the majority claims, the notice that Patrick received from the Mark Twain School requiring probable cause was "invalid and nugatory,"[169] then Patrick received no notice of any kind regarding locker searches. Certainly, the majority would argue that Patrick received notice from the statute itself, but subsection (b)(2) of the statute requires that the school's right to search student lockers be "announced or published previously *in the school.*"[170] This lack of notice prevents compliance with the statute under any interpretation.[171]

b. The Majority Does Not Address the Constitutional Issue of Lack of Notice.—Although the majority stated that "[t]he published school policy needs to be addressed . . . in the Fourth Amendment context of its effect on petitioner's reasonable expectation of privacy in the locker,"[172] the majority opinion avoided a complete Fourth Amendment analysis.[173] The test set forth by the Supreme Court in *T.L.O.* to determine whether a legitimate privacy expectation exists is what was

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164. *See id.*

165. *See id.*

166. *See id.* at 79, 746 A.2d at 421 (stating that "[s]ection 7-308(b) clearly conditions a school official's right to search a student's locker on the student having been given prior notification").

167. *See Patrick*, 358 Md. at 63, 746 A.2d at 412-13 (finding that school officials have the same right to search lockers that they have to search any other part of the school, and that neither probable cause nor reasonable suspicion is required for a locker search).

168. *Id.* at 79, 746 A.2d at 421 (Bell, C.J., dissenting).

169. *Patrick*, 358 Md. at 66, 746 A.2d at 414.

170. MD. CODE ANN., EDUC. § 7-308(b)(2) (1999) (emphasis added).

171. *See Patrick*, 358 Md. at 79, 746 A.2d at 421 (Bell, C.J., dissenting) (arguing that since the Mark Twain School failed to give the petitioner proper notice of its right to search lockers, the school had no right to conduct such a search).

172. *Patrick*, 358 Md. at 54, 746 A.2d at 407-08.

173. *See id.* at 73, 746 A.2d at 418 (Bell, C.J., dissenting) (arguing that "[a]s hard as the majority tries, it has not persuasively explained why the issue that we took this case to decide—whether the search of petitioner's school locker violated the Fourth Amendment—has not been presented").

reasonable under the circumstances.[174] Certainly, a published statement of school policy announcing that probable cause is required to search lockers would create a reasonable expectation of privacy.[175] The court admitted that the Mark Twain policy "[o]n its face . . . could serve as a basis for an expectation that lockers [would] not otherwise be searched."[176] However, the majority stated that, because they interpreted section 7-308 to invalidate the school policy, "that local policy . . . cannot serve as a basis for a student to have a *reasonable* expectation of privacy in the locker provided by the school."[177]

To justify its leap from the contention that the state statute overruled local policy to the proposition that an eighth grade student does not have a privacy interest in his locker, the court reasoned that it is "State policy that determines whether, and to what extent, petitioner had any reasonable expectation of privacy in the locker assigned to him."[178] However, it is unfair and unrealistic for the court to expect an eighth grade student, who received a school policy saying one thing, to research state law and realize that one interpretation of a state statute could be saying the opposite. The school policy gave Patrick a legitimate reasonable expectation of privacy in his locker.[179] Even if the majority's statutory interpretation were valid, it should not have the effect of negating Patrick's privacy expectation in light of the school policy he received.

c. The Majority Ignored Case Law That Focused on School Policies in Determining Whether Students Had a Reasonable Expectation of Privacy in Their Lockers.—The majority ignored cases it cited which consistently looked to schools' published policies to determine what level of privacy, if any, students could reasonably expect in their lockers. To reach the conclusion that Patrick should not have expected any level of privacy in his locker, the majority analogized Patrick's situation to

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174. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (stating that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search"). For a critique of the judiciary's response to the Supreme Court's decision in *T.L.O.*, see Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the* T.L.O. *School-Search Exception*, 66 N.Y.U. L. REV. 1077, 1078-79 (1991) (arguing that courts have misread *T.L.O.*'s narrow holding by applying its two-pronged test to all search and seizure cases in public schools and that the Fourth Amendment's requirement of probable cause should not be abandoned in all school search cases).

175. *See Patrick*, 358 Md. at 73-74, 746 A.2d at 418 (Bell, C.J., dissenting) (arguing that the Mark Twain School's Policy, which petitioner and his mother signed, established a legitimate expectation of privacy).

176. *Patrick*, 358 Md. at 62, 746 A.2d at 412.

177. *Id.* at 66, 746 A.2d at 414.

178. *Id.* at 62, 746 A.2d at 412.

179. *Id.* at 73, 746 A.2d at 418 (Bell, C.J., dissenting).

that of a student in a Wisconsin case who was given notice that his locker could be searched at any time and for any reason.[180] The court cited cases involving locker searches from various jurisdictions with differing determinations of the level of privacy a student may expect in his or her locker.[181] As the court noted, other courts have found that students do not have a legitimate expectation of privacy in their lockers.[182] Common to all these cases, however, is a published school policy specifying that lockers were subject to search by the school at any time, without notice.[183]

(1) The Inappropriate Comparison to Isiah.—The majority made several references to *In re Isiah B.*, a Wisconsin case in which a school gave students notice that their lockers could be searched at any time and for any reason, and in which the court found that they had no expectation of privacy.[184] The published school policy in *Isiah* stated in part:

> School lockers are the property of Milwaukee Public Schools. At no time does the Milwaukee school district relinquish its exclusive control of lockers provided for the convenience of students. Periodic general inspections of lockers may be conducted by school authorities for any reason at any time,

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180. *See id.*; *see also Patrick*, 358 Md. at 67, 746 A.2d at 414 (comparing the instant case to *In re Isiah B.*, 500 N.W.2d 637 (Wis. 1993), which found that students have no reasonable expectation of privacy in their school lockers when school policy explicitly retained possessory control of lockers and notice of this policy was given to students).

181. *See Patrick*, 358 Md. at 61-62, 746 A.2d at 411-12 (citing Commonwealth v. Snyder, 597 N.E.2d 1363 (Mass. 1992) (holding that students had a reasonable expectation of privacy in their lockers when school policy explicitly stated that lockers would not be subject to unreasonable search); Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998) (holding that students possess a minimal expectation of privacy in their lockers when school policy states that school officials may search lockers when they have a reasonable suspicion that the locker's contents may pose a danger); Shoemaker v. State, 971 S.W.2d 178 (Tex. App. 1998) (finding no legitimate expectation of privacy in student lockers when school policy informed students that their lockers were subject to search at any time); *In re* Isiah B., 500 N.W.2d 637 (Wis. 1993) (concluding that school policy stating that lockers could be searched at any time and for any reason removed any expectation of privacy in students' lockers).

182. *See, e.g.*, *Shoemaker*, 971 S.W.2d at 182 (holding that, where school officials had a master key to all lockers and students were given handbooks which stated that school officials had the right to search lockers at any time, students had no legitimate expectation of privacy in school lockers); *Isiah*, 500 N.W.2d at 641 (holding that, where school officials have pass keys to all lockers and students were prohibited from using private locks, students had no expectation of privacy in school lockers).

183. *See supra* notes 79-83 and accompanying text (providing examples of cases in which students were found to have no expectation of privacy in their lockers, based, in part, on published school policies warning them that their lockers were subject to search).

184. *Isiah*, 500 N.W.2d at 641.

> without notice, without student consent, and without a search warrant.[185]

Furthermore, school officials had pass keys for all lockers and students were forbidden to keep private locks on their lockers.[186] This case, described by the Court of Appeals as "akin" to the situation in *Patrick*,[187] could not be more different; the policy published by the Milwaukee Public School System explicitly removed any privacy interest from students' lockers, while the policy given to Patrick by the Mark Twain School created an expectation of privacy in student lockers by requiring probable cause to search them.[188]

Thus, the court compared a situation in which the privacy in lockers was explicitly removed by school policy to Patrick's situation, in which a school policy granted a heightened expectation of privacy in lockers by requiring probable cause to search them. Furthermore, the court in *Isiah* specifically stated that its finding of a lack of privacy expectation was based squarely on the school's policy.[189] The *Isiah* court went on to state that in the absence of such a policy, students may have a reasonable expectation of privacy in their lockers.[190] Some expectation of privacy is assumed unless the school's policy explicitly removes it.[191] If the Maryland General Assembly intended to remove this expectation, they could have easily drafted a statute similar to that of the Milwaukee public school system.[192]

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185. *Id.* at 639 n.1 (quoting Milwaukee Public School Handbook).

186. *Id.* at 639.

187. *Patrick*, 358 Md. at 67, 746 A.2d at 414.

188. *Compare* The Mark Twain School's Policies Regarding Student Behavior, *supra* note 10 (explaining that student lockers may be searched when school officials have probable cause to believe that a student is in possession of contraband), *with* Milwaukee Public School Handbook, *supra* note 185 (allowing school officials to conduct periodic inspections of lockers "for any reason at any time").

189. *See Isiah*, 500 N.W.2d at 641.

190. *Id.* The Wisconsin court noted the Supreme Court's reasoning in *T.L.O.* that "[a]lthough this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).

191. *Patrick*, 358 Md. at 61, 746 A.2d at 411 ("In the absence of such a clear policy, and especially when there is a contrary policy purporting to limit the ability of the school authorities to conduct a search, courts have concluded that students do have some legitimate privacy interest, even if a limited one.").

192. Even if one does accept that section 7-308 is controlling instead of the policy actually given to Patrick by his school, it does not follow that his privacy interest in his locker is automatically invalidated. In addition to being ambiguous, section 7-308 simply does not contain the language included in the school policies in the cases the majority cited. *See supra* note 79 (describing cases where published school policy sufficiently warned students that their lockers were subject to search, negating any expectation of privacy in students' lockers). Those policies specified that locker inspections could be conducted by the

(2) Snyder*: A More Precise Analogy.*—The *Patrick* court also discussed cases in which courts found that students have a privacy interest in their lockers based on published school policies—cases which are much more akin to Patrick's situation than *Isiah.*[193] In *Commonwealth v. Snyder,*[194] the school's student rights and responsibilities code stated that each student had "the right '[n]ot to have his/her locker subjected to unreasonable search.'"[195] The *Snyder* court held that "[i]n light of this assurance from the school administration, it is especially clear that Snyder had a reasonable expectation of privacy in his locker that was entitled to constitutional protection."[196] *Snyder,* rather than *Isiah,* is analogous to Patrick's situation because, as the Supreme Court of Massachusetts pointed out, "barring some express understanding to the contrary, students have a reasonable and protected expectation of privacy in their school lockers."[197]

d. The Problematic Consequences of the Majority's Decision.—In addition to ignoring case law indicating that school policies determine what privacy expectation students have in their lockers, the court in *Patrick* failed to address the implications of its decision.

(1) The Majority's Decision Abridges Maryland Public School Students' Fourth Amendment Rights.—The court's interpretation of section 7-308 as giving Maryland public school officials the unconditional right to search student lockers at any time and for any reason in the absence of such specific language constitutes an assault on students' Fourth Amendment rights.[198] As the Supreme Court noted in *T.L.O.,*

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school at any time and for any reason, whereas the Maryland statute specifies only that lockers are part of school property. MD. CODE ANN., EDUC. § 7-308(b) (1999).

193. *Patrick,* 358 Md. at 61-62, 746 A.2d at 411-12; *see supra* note 84 (describing cases cited by the majority in *Patrick* in which students were found to have an expectation of privacy in their lockers).

194. 597 N.E.2d 1363 (Mass. 1992).

195. *Id.* at 1366 (quoting Monument Mountain Regional High School Students' Rights and Responsibility Code).

196. *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).

197. *Id.* (citing State v. Joseph T., 336 S.E.2d 728 (W.Va. 1985)).

198. *See generally* Sunil H. Mansukhani, *School Searches After* New Jersey v. T.L.O.*: Are There Any Limits?,* 34 U. LOUISVILLE J. FAM. L. 345 (1996). Mansukhani argues that the Supreme Court's failure to set forth a clear standard in *T.L.O.* specifying what factors constitute a legitimate school search has allowed school officials across the United States to conduct unjustifiable searches on less than probable cause, in violation of students' Fourth Amendment rights. He states:

> Lower courts have used the *T.L.O.* standard to give school administrators a great deal of discretion in this area, and the result has been that the scope of court approved school searches has gradually expanded. . . . Although there is little doubt that school officials think they are doing the right thing when they conduct

absent a clear policy stating otherwise, some privacy interest in the belongings that a student brings to school is assumed.[199] According to the majority's reasoning in *Patrick*, section 7-308 forces children to surrender completely their privacy interest in anything they bring to school and place in their locker.[200] At least one court has recognized the absurdity inherent in such logic.[201] The Superior Court of Pennsylvania in *In re Dumas* stated:

> We are unable to conclude that a student would have an expectation of privacy in a purse or jacket which the student takes to school but would lose that expectation of privacy merely by placing the purse or jacket in school locker [sic] provided to the student for storage of personal items.[202]

The *Patrick* majority upheld the standard of reasonableness specified in section 7-308 for searches of items carried on a student's body, but gave public schools the unconditional right to search the same items in school lockers without adhering to *any* minimum standard.[203]

(2) The Impracticality of a Single Statewide Standard for Locker Searches.—The court's ruling that section 7-308 requires all public schools in Maryland to adhere to the same standard for locker searches is impractical.[204] Schools across the state may have drastically different needs, especially in regard to the appropriate standard for locker searches.[205] As the Court noted in *T.L.O.*, a certain degree of flexibility is needed in determining what level of privacy expectation is

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> these searches, the result has been that students' Fourth Amendment rights have been seriously curtailed.

Id. at 377.

199. *T.L.O.*, 469 U.S. at 339. Recognizing that a search of a child's closed container is "undoubtedly a severe violation of subjective expectations of privacy," the Court noted that "schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds." *Id.* at 338, 339.

200. *See Patrick*, 358 Md. at 66, 746 A.2d at 414.

201. *See In re* Dumas, 515 A.2d 984, 985-86 (Pa. 1986) (holding that students have an expectation of privacy in personal effects brought to school, as well as in their lockers).

202. *Id.* at 985.

203. *Patrick*, 358 Md. at 63, 746 A.2d at 412-13. *See generally* Jacqueline A. Stefkovich, *Students' Fourth and Fourteenth Amendment Rights After* Tinker*: A Half Full Glass?*, 69 ST. JOHN'S L. REV. 481 (1995) (discussing the development of the law regarding students' constitutional rights in schools and concluding that the balance has too often been struck in favor of school authorities, continually diminishing students' rights while punishing many for the acts of few).

204. *Cf. Patrick*, 358 Md. at 78, 746 A.2d at 420-21 (Bell, C.J., dissenting) ("The schools in this State are not monolithic; they are different.").

205. *See id.*

reasonable.[206] It would appear that Maryland's legislature provided such flexibility in section 7-308 by simply stating that public schools have the right to search lockers, allowing individual schools to determine what standard is best for them.[207] After all, as Chief Judge Bell noted in his dissent, each school's officials are in the best position "to assess and define their school's needs" and should be entitled to "set the basic rules and regulations pertaining to discipline and ensuring the safety of the school."[208]

The majority stated that allowing each school to determine its own policy would lead to "utter chaos," but the Mark Twain School is an example of a Maryland public school with special needs that may require different policies than other schools.[209] Ironically, the Mark Twain School—a school for children with significant social and behavioral problems—created a heightened standard to initiate a locker search in a situation in which a lowered standard would seem more appropriate.[210] Clearly, the Mark Twain School did not subscribe to the policies followed by other Maryland public schools regarding student behavior and disciplinary techniques.[211] In its "Policies Regarding Student Behavior," the Mark Twain School informs students and parents that if a student poses a danger to himself or others, "the student may be physically restrained by staff members," and that the staff are "regularly inserviced on proper physical restraint techniques."[212] The policy also states that students may not bring more than ten dol-

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206. *T.L.O.*, 469 U.S. at 339-40.

207. *See Patrick*, 358 Md. at 78, 746 A.2d at 421 (Bell, C.J., dissenting).

208. *Id.*, 746 A.2d at 420-21.

209. *See Patrick*, 358 Md. at 67-68 n.2, 746 A.2d at 415 n.2 (criticizing Chief Judge Bell's position that each school should be able to develop its own policy regarding locker searches).

210. *Id.* at 52, 746 A.2d at 407.

211. *See, e.g.*, The Montgomery County Public Schools Regulation GDB-RA: Protection of Employees, Students, and Property II.A.7(a) (1988) (stating that teachers may intervene in a physical fight between students when necessary to "restore order and to protect the safety of the combatants and surrounding persons"); Montgomery County Public Schools Regulation JGA-RA: Maintenance of Classroom Control and Discipline III.D. (1986) (allowing a teacher to physically restrain a student only "in an extraordinary case of breach of discipline . . . provided that the force used is reasonable under the circumstances); Howard County Public School System Code of Conduct and Discipline (expressly forbidding "physical discomfort" inflicted upon a student "for the purpose of maintaining discipline or to enforce school rules").

212. Record at E85, *Patrick* (No. 27) (setting forth the Mark Twain School's Policies Regarding Student Behavior). The policy goes on to state that students may be released from physical restraint "when they demonstrate that they are in control and available for counseling." *Id.*

lars to school, and, if they do, they must "undergo a self search" and any money exceeding ten dollars will be confiscated.[213]

These policies demonstrate the need for different Maryland public schools to make different policies to control student behavior.[214] Furthermore, as long as each school communicates its policy clearly to its students and apprises them of any changes, there is no reason why such flexibility would lead to chaos.[215]

5. Conclusion.—Many courts have exhibited difficulty in determining what standard should govern searches of students' lockers by school officials. Although the Supreme Court has not addressed this issue specifically, the Court has dealt with analogous situations, such as a search of a student's purse.[216] In that situation, the Court required that the search be reasonable under the circumstances, balancing the student's expectation of privacy against the school's interest in providing a safe environment.[217] This standard of reasonableness has been applied by many courts to locker searches.[218] Although there are serious safety concerns in schools today that might justify the result in *Patrick*, this approach could only be applied if the school had not specified the standard of probable cause. However, as many courts have concluded, the notice that the student was given by the school must control.[219] Patrick was informed by the Mark Twain School that his locker would not be searched absent probable cause.[220] Thus, he had a reasonable expectation of privacy in his locker which was violated by the Mark Twain School and improperly ignored by the Court of Appeals of Maryland.[221]

The majority's holding that an ambiguous state statute negates the privacy expectation created by this policy is unfair and unconstitutional. The court's ruling in *Patrick* demonstrates that the Maryland legislature must clarify section 7-308 and either create a uniform standard for all public schools or establish a minimum standard to initiate a locker search. With a minimum standard in place, individual

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213. *Id.*

214. *See Patrick*, 358 Md. at 78, 746 A.2d at 420-21 (Bell, C.J., dissenting) (arguing that individual schools are in the best position to assess their own needs, based on their unique circumstances).

215. *See id.*

216. *See* New Jersey v. T.L.O., 469 U.S. 325, 328 (1985).

217. *Id.* at 341.

218. *See supra* notes 79 & 84 and accompanying text (providing examples of cases in which state courts used the reasonableness test from *T.L.O.* in locker search cases).

219. *See supra* notes 79-89 and accompanying text.

220. *Patrick*, 358 Md. at 52-53, 746 A.2d at 406-07.

221. *Id.* at 66, 746 A.2d at 414.

schools could elect to offer greater protection to their students if they choose. Most importantly, schools must communicate their standard to their students, and to provide consistency and predictability, this standard must be used to judge the reasonableness of a search in any given situation. Until such a uniform system is implemented, the rights of public school students in Maryland may continue to be compromised.

KATHERINE P. RASIN

B. *Clarification of Maryland Wiretap Law's Exclusionary Rule Creates a Stronger Shield for Defendants*

In *Perry v. State*,[1] the Court of Appeals held that a defendant may invoke the exclusionary rule of the Maryland Wiretapping and Electronic Surveillance Act (the Act) even though a recording was made by his co-conspirator,[2] and that an interception need not be willful in order to constitute a violation of the Act for purposes of invoking the exclusionary rule.[3] The court reached the correct result on both issues by conducting its analysis with the ultimate goal of preserving the Act's "all-party consent" provision[4] and by adhering to standard principles of statutory interpretation. However, the majority's holding is problematic because its ambiguous language will likely lead to an overly broad application of the exclusionary rule. Specifically, the court's decision in *Perry* strongly implies that a defendant may invoke the exclusionary rule when his co-conspirator records a conversation, even if it is recorded in furtherance of the conspiracy.

1. *The Case.*—

a. Background.—Lawrence Horn, a resident of Los Angeles, hired James Perry, a resident of Detroit, to kill his eight-year-old son, Trevor Horn, and his former wife, Mildred Horn, who lived together in Rockville, Maryland.[5] Horn arranged the conspiracy in order to acquire a one million dollar trust established for Trevor from the proceeds of a personal injury claim.[6] In the early morning hours of March 3, 1993, Perry murdered Trevor, Mildred, and Trevor's nurse, Janice Saunders, who was in the house when Perry entered.[7]

Horn met Perry through Thomas Turner, Horn's cousin and a resident of Detroit.[8] Turner put the two men in contact with each

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1. 357 Md. 37, 741 A.2d 1162 (1999).

2. *Id.* at 62, 741 A.2d at 1175; *see infra* note 36 (providing the language of the Act's exclusionary rule).

3. *Perry*, 357 Md. at 66, 741 A.2d at 1178. The Act makes it unlawful to "willfully" intercept a communication. Wiretapping and Electronic Surveillance Act, MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (1998).

4. Section 10-402(c)(3) of the Act makes it lawful for a person to intercept a communication "where all of the parties to the communication have given prior consent to the interception." The State never contested that Lawrence Horn recorded James Perry's conversation without Perry's consent. *Perry*, 357 Md. at 70, 741 A.2d at 1180.

5. *Id.* at 42, 741 A.2d at 1164.

6. *Id.* at 40, 741 A.2d at 1164.

7. *Id.* Perry did not challenge the sufficiency of the evidence showing that he committed the murders as part of a conspiracy with Horn. *Id.*

8. *Id.* at 42, 741 A.2d at 1165. Turner testified for the State under a grant of immunity. *Id.*

other and acted as an intermediary to facilitate communication between the two after the murders took place.[9] Except for Turner's testimony and the recording at issue, the State's evidence of contact between Horn and Perry consisted of circumstantial evidence amounting to approximately 160 telephone calls during 1992 and 1993

> (1) from public telephones in Detroit, located near Perry's home or in places Perry was known to visit, to Horn's home in Los Angeles, (2) from public telephones in Los Angeles to Perry's home in Detroit or to places in Detroit Perry was known to visit, (3) from public telephones in the Rockville area to Horn's home and from Los Angeles to hotels in Maryland at times when Perry was in Maryland, and (4) from public telephones in the Maryland-District of Columbia suburban area to Perry's home at times when Horn was in Maryland.[10]

The State also presented evidence showing that Horn and Perry attempted to camouflage both their telephone contact and their monetary exchange.[11]

Nine days after the murders, the Los Angeles police, accompanied by a Maryland detective, seized a tape recording from Horn's apartment while executing a search warrant.[12] The recording was made on a micro-cassette and contained a twenty-two-second conversation between two men who were later identified as Horn and Perry.[13] The conversation is as follows:

> Horn: Yeah.
> Perry: Are you able to talk?
> Horn: No.
> Perry: OK. All right. So I mean, I'm sittin' there.
> Horn: Can you uh . . .
> Perry: I could take a picture, I could take a picture of him. You know, right you know right . . . there but I couldn't. The

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9. *Id.*

10. *Id.*

11. *Id.* at 42-43, 741 A.2d at 1165. All of the alleged calls between Horn and Perry originated from pay phones and were made with fictitious names or telephone cards in other people's names. *Id.* at 42, 741 A.2d at 1165. They also used at least one intermediary to communicate. *Id.* Using an alias, Horn transferred $6000 through Western Union in Los Angeles to Perry's girlfriend in Detroit. *Id.* at 43, 741 A.2d at 1165.

12. *Id.* at 43, 741 A.2d at 1165. The police also found three computers, computer disks, hard drives, back-up drives, video tapes, fifty-six cassette tapes, twelve micro-cassette tapes, and a telephone answering machine. *Id.*

13. *Id.*

> noise, you understand what I'm saying? I wasn't able to do the others, didn't, I didn't want to go uh front wise . . . ."[14]

Among the telephone records produced by the State, there was evidence of a twenty-two-second call made at 5:12 a.m. on March 3, 1993, to Horn's home shortly after the murders, from a pay phone not far from the scene of the crime.[15] The State alleged that this was the same twenty-two-second conversation between Horn and Perry found on the tape in Horn's apartment.[16] The State did not contest that Horn had recorded the conversation without Perry's consent.[17]

b. Procedural History.—Perry was convicted in the Circuit Court for Montgomery County of three counts of premeditated murder and one count of conspiracy to commit murder.[18] On the eleventh day of the trial, Perry attempted to suppress the recording by invoking the exclusionary rule of the Maryland Wiretapping and Electric Surveillance Act.[19] The court ruled that Perry had waived his objection to the recording because he did not move to suppress the tape before the trial began, and because he did not object when the State offered the recording into evidence on the previous day.[20] Perry never directed the court's attention to section 10-408(i) of the Act, which permits an aggrieved party to move to suppress a recording either before or during a trial.[21]

On his direct appeal to the Court of Appeals, Perry again argued that he should have been able to invoke the exclusionary rule because Horn had intercepted the conversation in violation of the Act.[22] The

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14. *Id.* at 43-44, 741 A.2d at 1166. At trial, Perry contended that the recording was unclear, but neither Perry nor the State contested the transcript of the tape, as addressed by the post-conviction judge. *Id.* at 44, 741 A.2d at 1166.

15. *Id.* at 44, 741 A.2d at 1166.

16. *Id.* This alleged conversation contradicted Horn's and Perry's pre-trial statements to police in which they denied ever speaking to each other. *Id.*

17. *Id.* at 70, 741 A.2d at 1180.

18. *Id.* at 40, 741 A.2d at 1164. Perry was sentenced to death for the three murders and received a separate sentence of life imprisonment for his conspiracy conviction. *Id.*

19. *Id.* at 46-47, 741 A.2d at 1167; *see infra* note 36 and accompanying text (providing the text of the exclusionary rule). Perry argued that the conversation recorded by Horn constituted the interception of a wire communication and was made without Perry's consent; therefore, under Maryland law, it was not recorded lawfully. *Perry*, 357 Md. at 46-47, 741 A.2d at 1167.

20. *Perry*, 357 Md. at 47, 741 A.2d at 1168.

21. *Id.*; *see* MD. CODE ANN., CTS. & JUD. PROC. § 10-408(i)(2) (1998) (providing that the motion to suppress the contents of a communication "may be made before or during the trial, hearing or proceeding").

22. Perry v. State, 344 Md. 204, 221, 686 A.2d 274, 282 (1999).

court affirmed Perry's conviction without prejudice to his argument on the admissibility of the recording.[23]

The Circuit Court for Montgomery County heard Perry's post-conviction case and found no error in the trial court's failure to suppress the recording, concluding that even if Perry had made a timely objection at trial, the recording would have been found admissible.[24] The post-conviction court articulated two theories in rejecting Perry's attempt to use the exclusionary rule of the Act. First, the court stated that Perry was bound by the acts of his co-conspirator and may be held to have waived his right of privacy in communications made in furtherance of the conspiracy.[25] Second, the court reasoned that Horn's recording was inadvertent and therefore, not in violation of the Act, which only bars the willful interception of a communication.[26]

On appeal from the post-conviction court, the Court of Appeals considered whether the recording should have been admitted at Perry's trial and limited its consideration to the following two issues: (1) whether, as a co-conspirator, Perry waived his right to privacy and, for that reason, could not avail himself of the Act's exclusionary rule, and (2) whether willfullness on the part of Horn was required for the intercepted communication to be suppressed.[27]

2. *Legal Background.*—When the Maryland General Assembly passed the Maryland Wiretapping and Electronic Surveillance Act in 1977, one of its primary goals was to limit the interception of private conversations.[28] The Act is modeled upon the federal wiretap act em-

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23. *Id.* at 229, 686 A.2d at 286.

24. *Perry*, 357 Md. at 52, 741 A.2d at 1170.

25. *Id.*

26. *Id.*

27. *Id.*

28. State v. Maddox, 69 Md. App. 296, 300, 517 A.2d 370, 372 (1986) (providing a brief overview of the Act's legislative history). *See generally* Marianne B. Davis & Laurie R. Bortz, *The 1977 Maryland Wiretapping and Electronic Surveillance Act*, 7 U. BALT. L. REV. 374 (1978) (providing an overview of the Maryland wiretap act, MD. CODE ANN., CTS. & JUD. PROC. § 10-401 to -414, and a comparison to its federal counterpart, 18 U.S.C. §§ 2510-2522 (1968)); Richard P. Gilbert, *A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law*, 8 U. BALT. L. REV. 183 (1979) (discussing the legislative history of the Act and the relative strict nature of the Act in comparison to the federal wiretap act).

Before the 1977 Wiretapping Act was passed, Maryland had two wiretapping statutes that governed the interception of communications. Gilbert, *supra*, at 185. Maryland's first wiretapping statute made it unlawful to use any type of equipment to overhear or record a private conversation "without the knowledge or consent, expressed or implied, of that other person." MD. ANN. CODE art. 35, § 93 (1957). The second statute made it unlawful to "obtain" a telephone conversation "unless consent is given by the participants." MD. ANN. CODE art. 27, § 125A (1971).

bodied in Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968, and extensively tracks the federal act's provisions.[29] Since the two acts are virtually identical, the Court of Appeals has stated that Maryland courts may look to decisions involving the federal act for guidance.[30] However, one of the fundamental distinctions between the two acts lies in their consent provisions.[31] The federal act permits the interception of a conversation so long as one of the parties has given prior consent.[32] The Maryland act, on the other hand, requires that all parties to the communication consent to the interception.[33] States have their own wiretap statutes that govern electronic interceptions in conjunction with the federal act.[34] Where the state act is more restrictive than the federal act, as it is in Maryland, the state act controls.[35]

a. Provisions of the Act That Are Helpful in Understanding Perry v. State.—The exclusionary rule embodied in section 10-405 reads:

> Whenever any wire or oral communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial . . . of this State . . . if the disclosure of that information would be in violation of this subtitle.[36]

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29. *See* Woods v. State, 290 Md. 579, 583, 431 A.2d 93, 95 (1981) (discussing the history of the Act); *see also* 18 U.S.C. §§ 2510-2522 (1994) (providing the text of the federal wiretap act); Davis & Bortz, *supra* note 28, at 374.

30. Baldwin v. State, 45 Md. App. 378, 379, 413 A.2d 246, 248 (1980).

31. *See Perry*, 357 Md. at 59-60, 741 A.2d at 1174-75. The differences between the consent provisions in the two acts led to a "critical distinction" between *Perry* and *United States v. Underhill*, 813 F.2d 105 (6th Cir. 1987), and the way the two cases were analyzed. *Perry*, 357 Md. at 59, 741 A.2d at 1174; *see also infra* notes 71-77 and accompanying text (describing the court's reasoning in *Underhill*).

32. 18 U.S.C. 2511(2)(d). The act provides, in relevant part:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception . . . .

Id.

33. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3).

34. *See, e.g.*, CAL. PENAL CODE § 631 (West 1999); CONN. GEN. STAT. § 52-570d (1991). *See generally* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837 (1998) (examining the function of the federal wiretap act and the differences in eavesdropping statutes among states).

35. Ricks v. State, 312 Md. 11, 14, 537 A.2d 612, 613 (1988) (describing the interplay between the federal and state wiretap acts in a case explaining the legality of non-consensual video surveillance by the police).

36. MD. CODE ANN., CTS. & JUD. PROC. § 10-405.

Section 10-402 describes unlawful acts and provides, in part:

> (a) *Unlawful acts.*—Except as otherwise specifically provided in this subtitle it is unlawful for any person to:
> (1) Wilfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
> (2) Wilfully disclose, or endeavor to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a . . . communication in violation of this subtitle; or
> (3) Wilfully use, or endeavor to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a . . . communication in violation of this subtitle.[37]

Although this section states that the unlawful act must be willful to constitute a violation of the Act, courts before *Perry* never addressed whether an interception had to be willful for an aggrieved party to claim a violation of the Act for the purpose of invoking the exclusionary rule.[38]

Section 10-407(c) of the Act describes the guidelines for lawful disclosure while giving testimony. It states, in part:

> Any person who has received, by any means authorized by this subtitle, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this subtitle, may disclose the contents of that communication or the derivative evidence while giving testimony . . . ."[39]

b. The Act's Exclusionary Rule.—The Act's exclusionary rule allows a defendant to suppress evidence of any recording made in violation of the Act.[40] The Court of Appeals recently held that a defendant may invoke the exclusionary rule even when his conversation was

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37. *Id.* § 10-402(a)(1)-(3).

38. *Perry*, 357 Md. at 64, 741 A.2d at 1176.

39. MD. CODE ANN., CTS. & JUD. PROC. § 10-407(c).

40. *Id.* § 10-405. Although the language of this section makes the right to suppress dependent upon whether *disclosure* would be a violation of the subtitle, the right ultimately rests on whether the communication was *intercepted* in violation of the subtitle, since the lawfulness of disclosure is based on the lawfulness of the interception. *See infra* notes 103-119 and accompanying text (providing the *Perry* court's analysis of the interplay among the provisions of the Act).

recorded in a jurisdiction other than Maryland, and when the interception was lawful in the jurisdiction where it was recorded.[41] Such enforcement is proper because "[i]t is plain that the legislative intent in the [Act] was to inhibit the disclosure in Maryland courts of the content of communications not intercepted in conformity with the public policy of this State."[42]

The all-party consent provision in section 10-402(c)(3) of the Act states that it is lawful for a person to intercept a wire communication "where all of the parties to the communication have given prior consent to the interception."[43] This provision distinguishes the Maryland act from the federal act, which makes an interception lawful with the consent of just one of the parties to the conversation.[44] The Maryland provision is "aimed at providing greater protection for the privacy interest in communications than the federal law."[45] The all-party consent provision has been a fundamental part of Maryland law for almost fifty years, and its lasting effect provides that no party to a telephone conversation takes the risk that another party, without proper governmental authorization, will record the conversation without consent.[46]

The importance of Maryland's all-party consent provision is evident in both the legislative history of the Act and the Maryland courts' subsequent decisions regarding the exclusionary rule. In 1973, Governor Marvin Mandel vetoed an attempt by the legislature to make a modification to the provision that would have permitted the interception of private conversations with only one party's consent.[47] He commented that "[t]he very opportunity for unwarranted spying and intrusions on people's privacy authorized by this bill is frightening."[48]

Dating as far back as forty-one years, the Maryland courts have interpreted the exclusionary rule of the Act and its predecessor with an eye toward enforcing the all-party consent provision. In *Robert v. State*,[49] the Court of Appeals ruled that a policewoman could not testify to the contents of an incriminating conversation between the de-

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41. Mustafa v. State, 323 Md. 55, 74-75, 591 A.2d 481, 485-86 (1991) (allowing the defendant in a Maryland court to invoke the exclusionary rule when his conversation was recorded legally in the District of Columbia, but in violation of Maryland wiretap laws due to a lack of consent).

42. *Id.*

43. MD. CODE ANN., CTS. & JUD. PROC. § 10-402.

44. 18 U.S.C. § 2511(2)(d) (1994).

45. *Mustafa*, 323 Md. at 74, 591 A.2d at 485.

46. *Perry*, 357 Md. at 61, 741 A.2d at 1175.

47. H.D. 962, 1973 Leg., Reg. Sess. (Md. 1973) (vetoed).

48. *Id.* at 1925.

49. 220 Md. 159, 151 A.2d 737 (1959).

fendant and an alleged rape victim because the conversation was intercepted without the defendant's consent.[50] In *Wood v. State*,[51] the court emphasized the importance of the all-party consent provision, holding that the State could invoke the exclusionary rule when the defendant attempted to play a non-consensual recording of a conversation between himself and a state witness.[52] These cases exemplify the importance that the Maryland courts have traditionally placed upon the all-party consent provision when applying the exclusionary rule. Recently, the Court of Appeals noted that "[w]e necessarily consider the application of the exclusionary rule in the context of the privacy interest in communications which the . . . Act is designed to protect."[53]

c. Interpreting the Act.—Although Maryland courts have not specifically addressed the "co-conspirator" and "willfulness" issues presented in *Perry*, the courts have articulated general provisions for interpreting the Act. The Court of Appeals has stated that "[i]n interpreting the Act's provisions, our goal is to ascertain and effectuate the intention of the legislature. Our focus is, therefore, centered upon the statute's purpose or policy."[54] Since one of the primary purposes of the Act is to limit the interception of private conversations,[55] a task accomplished through the all-party consent provision, courts have interpreted the Act so as to preserve the force of the consent provision.[56]

Maryland courts have taken a common-sense approach to interpreting the Act and have emphasized that such an interpretation should yield a logical result when measured against the Act's purpose.[57] The Court of Special Appeals in *Sanders v. State*[58] reiterated

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50. *Id.* at 171, 151 A.2d at 743. The defendant called the twelve-year-old rape victim at a motel where she was staying and discussed his criminal activity with her. *Id.* at 166, 151 A.2d at 740. The victim allowed the police to listen in on the conversation without the defendant's consent. *Id.*

51. 290 Md. 579, 431 A.2d 93 (1981).

52. *Id.* at 584-85, 431 A.2d 95-96. The defendant was charged with housebreaking. *Id.* at 580, 431 A.2d at 93. He recorded a conversation that he had with the owner of the house without the owner's consent, in which the owner asked for $750 in return for not testifying against the defendant. *Id.* at 581, 431 A.2d at 94. The defendant attempted to use a tape of this conversation to impeach the owner, who was a State's witness. *Id.*

53. Mustafa v. State, 323 Md. 65, 73, 591 A.2d 481, 485 (1991).

54. *Id.*, 591 A.2d at 484-85.

55. State v. Maddox, 69 Md. App. 296, 300, 517 A.2d 370, 372 (1986).

56. *See supra* notes 46-53 and accompanying text (describing the importance that the legislature and courts have given to the all-party consent provision of the Act).

57. *See infra* notes 58-61 and accompanying text (providing examples of such an approach to statutory interpretation).

58. 57 Md. App. 156, 469 A.2d 476 (1984).

that "a cardinal principle of statutory construction [is] that statutes are not to be construed in a manner which would lead to an absurd result."[59] Similarly, in *Prince George's County v. Burke*,[60] the Court of Appeals stated that when interpreting a statute, the words of that statute should be accorded their ordinary significance, so long as the language is unambiguous and consistent with the Act's purpose.[61]

d. Reasonable Expectations of Privacy and Violations of the Maryland Act.—Under the Act, the relevance of a reasonable expectation of privacy hinges on whether the intercepted conversation is an "oral communication" or "wire communication."[62] When an oral communication is intercepted, at least one of the parties must have a reasonable expectation of privacy for a violation to occur.[63] When a wire communication is intercepted, however, the parties' reasonable expectation of privacy is irrelevant in determining whether the Act has been violated.[64] This difference stems from the fact that the definition of an "oral communication" refers to a "private conversation," while the Act's definition of a "wire communication" makes no reference to privacy.[65] A telephone conversation is considered a wire communication for the purposes of both the Maryland and federal acts.[66]

e. A Co-Conspirator Exception to the Exclusionary Rule.—Under both the Maryland and Federal Rules of Evidence, a statement made by a co-conspirator during the course, and in furtherance, of the con-

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59. *Id.* at 169, 469 A.2d at 483 (rejecting the State's argument that the Act is violated if authorized federal agents, rather than authorized Maryland law enforcement officers, intercept a communication).

60. 321 Md. 699, 584 A.2d 702 (1991).

61. *Id.* at 706, 584 A.2d at 706; *see also* Whack v. State, 338 Md. 665, 672, 659 A.2d 1347, 1350 (1995) (explaining that the goal of statutory interpretation is to effectuate legislative intent, which can be ascertained through the ordinary and natural meaning of the statute's language); Gargliano v. State, 334 Md. 428, 435, 639 A.2d 675, 678 (1994) (beginning its statutory analysis with an examination of the ordinary and popularly understood meaning of the statute's language).

62. Fearnow v. Chesapeake & Potomac Tel. Co. of Md., 342 Md. 363, 376, 676 A.2d 65, 71 (1995). A "wire communication" includes "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception." MD. CODE ANN., CTS. & JUD. PROC. § 10-401(1)(i) (1998). An "oral communication" is "any conversation or words spoken to or by any person in *private* conversation." *Id.* § 10-401(2)(i) (emphasis added).

63. *Fearnow*, 342 Md. at 376, 676 A.2d at 71-72.

64. *Id.*

65. *Id.*; *see also supra* note 62 (providing the definition of "oral" and "wire" communications under the Act).

66. Fearnow v. Chesapeake & Potomac Tel. Co. of Md., 104 Md. App. 1, 34-35, 655 A.2d 1, 17-18, *rev'd on other grounds*, 342 Md. 363, 676 A.2d 65 (1995).

spiracy is admissible as an exception to the hearsay rule.[67] Maryland courts, however, have not decided whether a defendant may use the exclusionary rule of the Act when the interception is made by a co-conspirator.[68] Other courts have split when deciding whether there is a co-conspirator exception to the federal wiretap act's exclusionary rule.[69] The exclusionary rule of the federal act contains virtually the same language as that of the Maryland act.[70]

In *United States v. Underhill*,[71] the Sixth Circuit held that a defendant may not use the exclusionary rule to suppress a recording made by his co-conspirator in furtherance of the conspiracy.[72] The defendant in *Underhill* was a customer of an illegal gambling operation.[73] The individuals who ran the operation recorded their telephone conversations with the defendant in order to maintain records of the gambling transaction.[74] These recordings were unlawful under the federal wiretap act because they were made for the purpose of committing a criminal act, not because they were non-consensual.[75] The court found that the defendant could not suppress the recording because, although there was a violation of the federal wiretap act, that violation was due to the defendant's own illegal activity, and the exclusionary rule was not intended to protect an individual in that situation.[76] The court stated that, in formulating the exclusionary rule, Congress "did not intend to deprive prosecutors of the most cogent evidence of wrongdoing because the defendants record evidence of

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67. MD. R. 5-803 (1999). Under the Federal Rules of Evidence, such a statement is technically considered non-hearsay rather than an exception to the hearsay rule. FED. R. EVID. 801(d)(2)(E) (1999).

68. Although Maryland courts have not addressed the specific issue of whether a defendant may invoke the exclusionary rule of the Act when an incriminating communication is intercepted by a co-conspirator, it has been noted that when interpreting the Act, Maryland courts may look to other courts' interpretations of the federal wiretap act for guidance. Baldwin v. State, 45 Md. App. 378, 380, 413 A.2d 246, 248 (1980).

69. *See infra* notes 71-71 and accompanying text.

70. *Compare* 18 U.S.C. § 2515 (1994), *with* MD. CODE ANN., CTS. & JUD. PROC. § 10-405 (1999).

71. 813 F.2d 105 (6th Cir. 1987).

72. *Id.* at 112-13.

73. *Id.* at 107.

74. *Id.* at 108.

75. *Id.* The federal wiretap act makes it unlawful to record a conversation if the recording is created for the purpose of committing a criminal act. 18 U.S.C. § 2511(2)(d). The recording in *Underhill* was made in violation of a Tennessee law that prohibits the making of gambling records. *Underhill*, 813 F.2d at 108.

76. *Underhill*, 813 F.2d at 112 ("We think it is clear that Congress did not intend for § 2515 to shield the very people who committed the unlawful interceptions from the consequences of their wrongdoing.").

their crimes by intercepting communications with their confederates."[77]

The Sixth Circuit's decision in *Traficant v. C.I.R.*[78] is consistent with its decision in *Underhill.* In *Traficant,* the court refused to allow the defendant, a Congressman charged with failure to report a bribe, to use the exclusionary rule to suppress a recording made by one of his bribers.[79] The court explained that the exclusionary rule was not intended "to protect wrongdoers whose criminal activity is tape recorded by their own confederates."[80]

Other courts interpreting the federal wiretapping act have found that there is no co-conspirator exception to the law's exclusionary rule. In *United States v. Vest,*[81] the court ruled that the defendant could use the exclusionary rule when his conversation was recorded by an accomplice to his bribery scheme.[82] The California Court of Appeal similarly interpreted the federal wiretapping law in *People v. Murtha.*[83] The California court permitted the use of the exclusionary rule when an informant surreptitiously recorded a conversation between the defendant and the defendant's co-conspirator.[84] The courts' interpretation of the exclusionary rule in these cases was defendant-oriented because it permitted the defendant to suppress a conversation even though it was a conversation between him and his co-conspirator.[85]

While federal courts have split on the issue, Maryland courts before *Perry* had not decided whether a defendant could use the exclusionary rule to suppress a recording made by a co-conspirator.

3. The Court's Reasoning.—

a. There Is No Co-Conspirator Exception to the Exclusionary Rule.—In *Perry,* the majority held that the defendant was not precluded from invoking the exclusionary rule of the Act merely because

77. *Id.*

78. 884 F.2d 258 (6th Cir. 1989).

79. *Id.* at 266.

80. *Id.*; *see also* United States v. Nietupski, 731 F. Supp. 881, 886 (C.D. Ill. 1990). In *Nietupski,* an Illinois federal district court also held that a defendant could not suppress a tape that was made by his co-conspirator to a drug offense. *Nietupski,* 731 F. Supp. at 886.

81. 813 F.2d 477 (1st Cir. 1987).

82. *Id.* at 481. The defendant in *Vest* was a police detective indicted for making false statements before a grand jury regarding the taking of bribes. *Id.* at 479. He sought to suppress a recording of his conversation, made by a briber, which showed that the defendant had lied under oath. *Id.*

83. 18 Cal. Rptr. 2d 324 (Cal. Ct. App. 1993).

84. *Id.* at 328.

85. *Id.* at 325.

his conversation was intercepted by his co-conspirator.[86] Judge Wilner, writing for the majority, treated the issue as one of statutory construction and found that there is no co-conspirator exception "embodied or implicit" in the Act.[87]

The court was reluctant to recognize a possible implied co-conspirator exception to the exclusionary rule, because the Act bars interceptions except as otherwise "*specifically*" provided for in the Act.[88] Since there is no co-conspirator exception to the exclusionary rule specifically provided in the Act, and since the court found no basis for recognizing an implied co-conspirator exception, it concluded that a co-conspirator exception does not exist.[89]

In deciding that co-conspirators may use the exclusionary rule, the court recognized the importance of the all-party consent provision

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86. *Perry*, 357 Md. at 63, 741 A.2d at 1175. Chief Judge Bell and Judges Eldridge and Raker joined Judge Wilner's majority opinion. *Id.* at 39-40, 741 A.2d at 1164. Judge Rodowsky filed a dissenting opinion joined by Judge Karwacki. *Id.* at 89, 741 A.2d at 1189 (Rodowsky, J., dissenting).

After ruling on the admissibility of the tape, the majority addressed several subsequent issues, reversed the judgment of the post-conviction court, and remanded the case for a new trial. The court held that: (1) the trial court's decision to admit the tape was not harmless error, *id.* at 74, 741 A.2d at 1182; (2) Perry waived his objection to the recording as a result of his counsel's actions at trial, *id.* at 77-78, 741 A.2d at 1184; and (3) Perry's counsel was constitutionally deficient under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Perry*, 357 Md. at 87, 741 A.2d at 1189.

Judge Cathell filed a separate dissenting opinion presenting an issue outside the scope of this Note. *Id.* at 95, 741 A.2d at 1193 (Cathell, J., dissenting). Judge Cathell argued that Perry should not be able to invoke the exclusionary rule because Horn was not physically in Maryland when he violated the Act. *Id.* at 104-05, 741 A.2d at 1198. Judge Cathell contended that the Court of Appeals made the wrong decision in *Mustafa* when it held that a defendant could invoke the exclusionary rule of the Act even though the interception occurred in another jurisdiction, and the interception was lawful in that jurisdiction. *Id.* Judge Cathell urged that *Mustafa* "should be overruled, or at least distinguished from this case." *Id.* at 95, 741 A.2d at 1193.

87. *Perry*, 357 Md. at 57, 741 A.2d at 1173. While the court considered the issue to be one of statutory construction, Perry contended that the issue required an application of the co-conspirator exception to Maryland's rule against hearsay. Brief for Appellant at 10-14, *Perry* (No. 23); *see* rule MD. R. 5-803(a)(5) (1999). Perry argued that Maryland's hearsay rule applies to communications made in furtherance of a conspiracy, and the recording of his conversation with Horn did not fall into this category. Brief for Appellant at 10-14, *Perry* (No. 23). Perry claimed that the tape was not the conversation that occurred on the morning of the murders, and, therefore, there was no way to determine whether it was made in furtherance of the conspiracy. *Id.* at 10-11. Alternatively, Perry argued that if the recording in question was the conversation he had with Horn at 5:20 on the morning of the murders, it was made after the murders took place and, therefore, was not in furtherance of the conspiracy because the goal of the conspiracy had already been accomplished. *Id.*

88. *Perry*, 357 Md. at 62, 741 A.2d at 1175 (emphasis added) (quoting MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a) (1998)).

89. *Id.*

of the Act.[90] The court referred to *Mustafa v. State*,[91] pointing out that Maryland's all-party consent provision is designed to provide greater protection than the federal wiretap act.[92] The court noted that the all-party consent provision has been a part of Maryland law since 1956, and that the one attempt to modify it had been vetoed.[93] Based on this history, the court emphasized that, under the Act, participants to a telephone conversation rely on the fact that their conversation will not be surreptitiously recorded.[94] The court concluded that this fundamental protection should apply even in instances where co-conspirators are speaking with each other, as Horn and Perry were.[95]

The majority explained that the post-conviction court's reliance on *United States v. Underhill*[96] was improper because the *Underhill* decision was based on the federal wiretap act, which, unlike the Maryland act, does not have an all-party consent provision.[97] In *Underhill*, the recording was made in violation of the federal act because it was recorded for the purpose of committing a crime, while in *Perry*, the recording was unlawful because it was made without Perry's consent.[98] The majority distinguished the two cases by explaining that, in *Underhill*, the defendant would not have been an aggrieved party had it not been for the fact that the recording of the conversation was for criminal purposes—that is, to keep a record of all the bets that had been placed.[99] In contrast, Perry was an aggrieved party because his conversation was recorded in violation of Maryland's all-party consent provision.[100] Therefore, unlike the defendant in *Underhill*, Perry was subjected to an unlawful interception, independent of the fact that he was speaking with his co-conspirator.

b. A Recording Does Not Have to Be Willful for a Defendant to Invoke the Exclusionary Rule.—The *Perry* court also held that a defendant may suppress a non-consensual recording under the exclusionary

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90. *Id.* at 60-62, 741 A.2d at 1174-75 (providing legislative history of the Act and Maryland case law reflecting the importance of the all-party consent provision).

91. 323 Md. 65, 591 A.2d 481 (1990).

92. *Perry*, 357 Md. at 60-61, 741 A.2d at 1175 (citing *Mustafa*, 323 Md. at 74, 591 A.2d at 485).

93. *Id.* at 61, 741 A.2d at 1175.

94. *Id.*

95. *Id.* at 62, 741 A.2d at 1175.

96. 813 F.2d 105 (1987); *see also supra* notes 71-77 and accompanying text (providing the facts and holding of *Underhill*).

97. *Perry*, 357 Md. at 59-60, 741 A.2d at 1174.

98. *Id.*

99. *Id.*

100. *Id.* at 60, 741 A.2d at 1174.

rule of the Act regardless of whether the conversation was recorded willfully.[101] The court reasoned that the willfullness requirement in section 10-402 should only be a prerequisite to a violation when an interceptor is being prosecuted criminally or civilly, but not when an individual attempts to show that the Act has been violated so that he may use the exclusionary rule.[102]

The majority examined the interplay among the relevant sections of the Act, which it referred to as "a bit convoluted."[103] Since the exclusionary rule bars the admission into evidence of a recording if such disclosure would be a violation of the Act,[104] the court explained that it is necessary to first examine the sections of the Act that refer to disclosure.[105] Section 10-402(a)(2) makes it unlawful to disclose a communication made in violation of the Act.[106] Accordingly, the State argued: (1) it is a violation of the Act to *willfully* intercept a communication;[107] (2) Horn intercepted the communication inadvertently and not willfully;[108] (3) Horn's interception therefore was not a violation of the Act; and (4) since it was not made in violation of the Act, the recording does not fall under the purview of the exclusionary rule.[109] The majority rejected this interpretation and instead used the disclosure provision of section 10-407(c) to show that disclosure in Perry's case was not lawful under the Act.[110] It reasoned that section 10-407(c) permits disclosure of a recording during testimony if the recording is made "in accordance with" the Act.[111]

The court stated that Horn's surreptitious recording clearly could not be considered "in accordance with" the Act, because the Act re-

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101. *Id.* at 66, 741 A.2d at 1178.

102. *Id.*, 741 A.2d at 1177-78. Section 10-402(b) makes it a felony to violate subsection (a), which includes the interception, disclosure, or use of communications. Section 10-410(a) creates a civil cause of action for an aggrieved party against the interceptor. MD. CODE ANN., CTS. & JUD. PROC. §§ 10-402, 10-410 (1998).

103. *Perry*, 357 Md. at 64, 741 A.2d at 1176.

104. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-405.

105. *Perry*, 357 Md. at 63, 741 A.2d at 1176.

106. MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(2).

107. *Id.* § 10-402(a)(1).

108. *Perry*, 357 Md. at 63, 741 A.2d at 1176. The post-conviction court found that Horn recorded Perry's conversation inadvertently and, therefore, not willfully. *Id.* at 52, 741 A.2d at 1170. The *Perry* court noted the post-conviction court's conclusion that "from the 'extraordinary lengths' they went to hide their relationship, that '[t]o suggest that Horn would 'willfully' record a conversation between himself and Perry defies logical explanation.'" *Id.* at 52, 741 A.2d at 1170.

109. *Id.* at 63, 741 A.2d at 1176.

110. *Id.*

111. *Id.* at 65, 741 A.2d at 1177.

quires the consent of all parties.[112] The court explained that if a non-willful recording never constituted a violation of the Act, as the State asserted, then it would be possible for a party to lawfully record a conversation without the consent of all parties so long as the interceptor made the recording inadvertently.[113] The majority explained that such an interpretation of the Act would defeat the purpose of the all-party consent provision, which is a substantive provision of the Act.[114] The court stated that "[t]he Legislature has made unmistakably clear that, except as otherwise specifically provided in the subtitle, wire communications are not to be intercepted without the consent of all parties . . . . [T]hat has been part of our law for more than 40 years and represents a fundamental substantive statement of public policy."[115]

The court concluded that the term "willfully" in section 10-402(a) is only applicable to the *mens rea* required for a civil or criminal action brought against the intercepting party.[116] To further justify this determination, the majority stressed that

> [t]he exclusionary provision operates only upon the communication itself, depriving it of evidentiary value, rather than against the person or property of the interceptor . . . . From the point of view of the person whose conversation was intercepted without his or her consent and is later sought to be used in evidence, the interceptor's mental state at the time of the interception is of marginal relevance. Whether the interception was done willfully or non-willfully, the violation of the person's right to privacy was the same.[117]

In his dissent, Judge Rodowsky found that Horn's recording was admissible in evidence because a willful recording is a prerequisite to a violation, for the purposes of the exclusionary rule. He reasoned that because Horn recorded the conversation inadvertently, such action was not done in violation of the Act.[118] Judge Rodowsky used predominantly the same argument as the State to conduct what he termed a "straightforward" legal analysis of the Act.[119]

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112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 66, 741 A.2d at 1177-78.
118. *Id.* at 88-89, 741 A.2d at 1189-90 (Rodowsky, J., dissenting).
119. *Id.* at 88, 741 A.2d at 1190. Judge Rodowsky decided that the post-conviction court did not err in finding that Horn's recording was inadvertent. *Id* at 89-90, 741 A.2d at 1190. He agreed with the post-conviction court's conclusion that since Horn and Perry went to

4. Analysis.—In *Perry v. State*, the court held that a defendant may use the exclusionary rule of the Act even when his conversation was recorded by his co-conspirator,[120] and that the willfullness of an interception is irrelevant in determining whether a recording is a violation of the Act for the purposes of the exclusionary rule.[121] In both instances, the court reached the correct result because it preserved one of the Act's primary purposes—to protect the privacy of parties to a communication through the all-party consent provision.[122] However, the court's ambiguous language will likely lead to an overly broad application of the exclusionary rule because the court's reasoning strongly implies that a defendant may use the exclusionary rule even when his conversation was recorded in furtherance of a conspiracy.

a. Is There a Co-Conspirator Exception to the Exclusionary Rule?—The court's extension of the exclusionary rule to defendants, regardless of whether the rule is used to suppress recordings made by co-conspirators, is correct because it preserves the force of the Act's all-party consent provision.[123] However, the holding is problematic because the court's language does not clearly indicate whether a defendant may always use the exclusionary rule when his communication is intercepted by a co-conspirator or whether a defendant may use the exclusionary rule so long as the co-conspirator did not intercept the communication in furtherance of the conspiracy. The court's language in *Perry* strongly implies that its holding endorses the former proposition, but the latter of the two should be the definitive rule because the former would lead to an application of the exclusionary rule that the legislature could not have intended.[124]

(1) The Court's Holding Is Ambiguous Because the Text of the Holding and the Court's Discussion Imply Contradictory Results.—The court held:

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extraordinary lengths to hide their relationship, the only rational explanation for the recording is that it was made inadvertently. *Id.*

120. *Perry*, 357 Md. at 62, 741 A.2d at 1175.

121. *Id.* at 66, 741 A.2d at 1178.

122. *See supra* notes 43-53 (describing the legislative history of the Act and the importance that courts have given to the all-party consent provision).

123. *See supra* notes 43-53 and accompanying text (explaining the importance of the all-party consent provision and providing examples of the court's enforcement of the provision).

124. *See* Sanders v. State, 57 Md. App. 156, 169, 469 A.2d 476, 483 (1984) (rejecting an interpretation that would make it impossible for authorized federal agents to intercept a communication in accordance with the Act).

> [A]lthough conspirators are generally bound by the acts and statements of their co-conspirators, done or made in furtherance of the conspiracy, there is no basis for concluding that an otherwise aggrieved person—in this instance one whose conversation is taped without his consent—loses his right to suppress the tape merely because the taping is done by a co-conspirator.[125]

Reading the text of the holding alone, one could reasonably infer that the court intended that a defendant may not use the exclusionary rule to suppress a conversation between himself and a co-conspirator when that conversation was made in furtherance of a conspiracy.[126] The court seems to contrast acts done "in furtherance of the conspiracy" with an act done "merely" by a co-conspirator, but not in furtherance of the conspiracy.[127] This distinction, placed in the context of the holding, strongly implies that a defendant whose conversation is recorded in furtherance of a conspiracy may not suppress a recording, but a defendant whose conversation is recorded by a co-conspirator, but not in furtherance of the conspiracy, may suppress the recording.

An inference, though not as strong, could also be made from the text of the holding that a defendant may suppress a recording even though it was made in furtherance of a conspiracy.[128] By using the term "merely" to describe a co-conspirator's taping, the court could be implying that such a recording does not qualify as an act or statement to which co-conspirators are generally bound.[129] Under this interpretation, the recording would be subject to the exclusionary rule because such a recording would not be considered an act that bonds co-conspirators. Therefore, whether the act was done in furtherance of the conspiracy would be irrelevant.

Although the text of the holding is ambiguous, its stronger inference is that a conspirator may use the exclusionary rule to suppress a tape made by a co-conspirator so long as the recording was not made in furtherance of the conspiracy.[130] However, when the court's discussion is read in its entirety, it becomes quite apparent that the court decided that a defendant may use the exclusionary rule even when the conversation was recorded by a co-conspirator in furtherance of the

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125. *Perry*, 357 Md. at 62, 741 A.2d at 1175.

126. *See id.*

127. *Id.*

128. *See id.*

129. *See id.*

130. *See id.*; *supra* notes 125-129 and accompanying text (discussing the court's holding).

conspiracy.[131] Several aspects of the court's discussion support this contention.

First, the court spends most of its discussion distinguishing the circumstances of *Underhill* and *Perry* by pointing out the differences in the wiretap acts that governed each case.[132] In *Underhill*, the recording at issue was made in furtherance of a conspiracy, and the majority in *Perry* clearly recognized this fact.[133] If the *Perry* court was not operating under the assumption that Perry's conversation was also recorded in furtherance of a conspiracy, then it certainly would have been imperative for the majority to point out this distinguishing factor in its discussion, but it did not.[134] Therefore, the court's decision that Perry could suppress the recording must have been made in recognition of, and despite, the fact that the recording was made in furtherance of a conspiracy.

A second indication of this contention is that the post-conviction court that Perry came before was operating under the assumption that the conversation was recorded in furtherance of a conspiracy.[135] The Court of Appeals obviously recognized this assumption; it quoted the lower court's statement that the recording was admissible against Perry because "Perry was his co-conspirator and the recording was an act done in furtherance of the conspiracy."[136] Again, if the *Perry* court was not operating under this same assumption, it would have been essential to note this potentially critical difference in the course of overturning the post-conviction court's decision.

A third indication that the court meant to allow suppression even if the recording was made in furtherance of a conspiracy lies in the structure of its analysis. If the court believed that a co-conspirator should not be able to use the exclusionary rule when a conversation was in furtherance of a conspiracy, then it likely would have employed a two-pronged test in determining whether Perry could use the exclusionary rule, namely: (1) was the recording made in violation of the Act; and (2) was the recording made while the defendant and co-con-

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131. *See infra* notes 135-139 and accompanying text (supporting the contention that the court meant its holding to state that a defendant may use the exclusionary rule even when the recording was made in furtherance of the conspiracy); *see also Perry*, 357 Md. at 56-62, 741 A.2d at 1172-76 (discussing the co-conspirator's ability to use the exclusionary rule).

132. *See Perry*, 357 Md. at 56-60, 741 A.2d at 1172-74.

133. *Id.* at 58-59, 741 A.2d at 1173-74. The *Perry* court quoted the *Underhill* court's statement that the defendant was acting in furtherance of the conspiracy. *Id.* at 58-59, 741 A.2d at 1174.

134. *See id.* at 56-62, 741 A.2d at 1172-76.

135. *Id.* at 56, 741 A.2d at 1172.

136. *Id.*

spirator were acting in furtherance of their conspiracy? The *Perry* court, however, made no attempt to answer the second prong of this test.[137]

These three factors indicate that the court believed that whether a recording is made in furtherance of a conspiracy is irrelevant to the application of the exclusionary rule, despite the fact that the text of the holding might suggest otherwise.[138] As a result of the court's ambiguity, a defendant in the future legitimately will be able to argue that his recorded conversation is suppressible under the exclusionary rule, even if the recording is made by his co-conspirator in furtherance of the conspiracy.[139]

(2) A Recording Made in Furtherance of a Conspiracy Should Not Be Subjected to the Exclusionary Rule.—It would undermine the purpose of the Act if a defendant was allowed to use the exclusionary rule to suppress a recording that was made in furtherance of a conspiracy. The Act was created to protect the privacy of individuals who are parties to a conversation.[140] The exclusionary rule should not offer this type of protection to a criminal who is engaged in the furtherance of a conspiracy.[141] Allowing such an individual, like Perry, to invoke the exclusionary rule would be illogical because Perry would be able to commit murder as part of a conspiracy, then hide behind the protection of the Act to suppress evidence that his co-conspirator generated while the two were planning or covering up the murder.[142] Limiting the use of the exclusionary rule to conversations not made in furtherance of a conspiracy would be consistent with the principles of statu-

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137. *See id.* at 56-62, 741 A.2d at 1172-76 (deciding the co-conspirator issue without addressing the question of whether the conversation was recorded in furtherance of the conspiracy).

138. *See id.* at 62, 741 A.2d at 1175; *see also supra* text accompanying note 125 (providing the text of the holding).

139. In *State v. Rivenbark*, relied upon by Perry in his brief, the Court of Appeals of Maryland stated that a conspiracy ends when its central objective has been achieved. 311 Md. 147, 158, 533 A.2d 271, 276 (1987). The court addressed this issue in the context of deciding whether evidence should be admissible under the co-conspirator exception to the hearsay rule. *Id.* at 147, 533 A.2d at 271.

140. *See* State v. Maddox, 69 Md. App. 296, 300, 517 A.2d 370, 372 (1986); *see also supra* notes 43-53 (explaining the importance of the all-party consent provision).

141. *Cf. Maddox*, 69 Md. App. at 301, 517 A.2d at 372 (precluding the defendant from using the exclusionary rule when the defendant consented to the recording of the conversation, and the interception was technically a violation of the Act only because the other party did not consent).

142. *See* Sanders v. State, 57 Md. App. 156, 171, 469 A.2d 476, 484 (1984). The *Sanders* court rejected an illogical interpretation of the Act, which would have made it impossible for authorized federal agents to intercept a communication in accordance with the Act. *Id.*

tory interpretation articulated by Maryland courts that previously interpreted the Act.[143]

Even though a reasonable expectation of privacy is generally not relevant when analyzing wire communications,[144] the *Perry* court should have found that Perry had no privacy right and could not invoke the exclusionary rule when acting in furtherance of a conspiracy. This decision would be consistent with courts that have chosen to deny individuals certain rights under the federal wiretap act, even when such a denial is not specifically mandated in the language of the Act.[145] In its presentation of the issue, the majority asked if Perry "waived his right to privacy" as a co-conspirator.[146] This question implies that the court recognized a tangible and revocable expectation of privacy in wire communications, even though such a right is generally irrelevant or implied.

In *State v. Maddox*,[147] the Court of Special Appeals refused to allow a defendant to use the exclusionary rule even though such use would be facially permitted by the Act.[148] The defendant attempted to suppress an incriminating recording, even though he had consented to the recording.[149] Since the other party had not consented, the defendant attempted to suppress the recording because it was a technical violation of the all-party consent provision.[150] The court called this result "ludicrous," and its comment should be equally ap-

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143. *See* Mustafa v. State, 323 Md. 65, 73, 591 A.2d 481, 484-85 (1991) (stating that courts interpreting the Act should use its purpose or policy as guidelines); Prince George's County v. Burke, 321 Md. 699, 706, 584 A.2d 704, 706 (1991) (finding that the words of a statute should be given their ordinary meaning so long as they are consistent with the statute's purpose); *Sanders*, 57 Md. App. at 169, 469 A.2d at 483 (stating that interpretation of the Act should not lead to an absurd result).

144. *See* Fearnow v. Chesapeake & Potomac Tel. Co. of Md., 342 Md. 363, 376, 676 A.2d 65, 71-72 (1995); Fearnow v. Chesapeake & Potomac Tel. Co. of Maryland, 104 Md. App. 1, 34-35, 655 A.2d 1, 17-18 (1995); *see also supra* notes 62-66 and accompanying text (explaining the difference in the role of a reasonable expectation of privacy in wire communications and oral communications).

145. *See, e.g.*, Traficant v. C.I.R., 884 F.2d 258, 266 (6th Cir. 1989) (refusing to allow the defendant to use the exclusionary rule when his conversation was recorded by one of his bribers); United States v. Underhill, 813 F.2d 105, 112-13 (6th Cir. 1987) (precluding the defendant from using the exclusionary rule even though his conversation was technically recorded unlawfully under a narrow, literal reading of the federal wiretap act); United States v. Nietupski, 731 F. Supp. 881, 886 (C.D. Ill. 1990) (denying a defendant the use of the exclusionary rule when his conversation was recorded by his co-conspirator to a drug offense).

146. *Perry*, 357 Md. at 55, 741 A.2d at 1171.

147. 69 Md. App. 296, 517 A.2d 370 (1986).

148. *Id.* at 300-01, 517 A.2d at 371-72.

149. *Id.* at 298, 517 A.2d at 371.

150. *Id.* at 299, 517 A.2d at 371.

plicable to Perry—"[t]he protective umbrella that the Legislature raised over [individuals] who do not consent to the interception of their conversations affords [the defendant] no shelter."[151] The court should have stated, in no uncertain terms, that a defendant may use the exclusionary rule to suppress a recording made by his co-conspirator, so long as the conversation was not in furtherance of the conspiracy.

b. Must an Interception Be Willful to Constitute a Violation of the Act for the Purposes of the Exclusionary Rule?—The majority correctly held that willfullness on the part of the interceptor is not required for a defendant to invoke the exclusionary rule.[152] This decision is consistent with general principles of statutory interpretation because a requirement of willfullness in this case would yield an absurd result when measured against the intent of the Act.[153]

Perry sought to use the exclusionary rule, arguing that Horn had violated Perry's privacy by recording their conversation without his consent.[154] The exclusionary rule is intended to protect individuals whose privacy rights are violated.[155] The legislature placed great importance on this privacy right, as evidenced by the fact that it prohibited the use of communications intercepted in violation of the Act in Maryland's courts, even when the interception itself does not occur in Maryland.[156] By merely having his conversation intercepted and placed on tape, Perry's privacy was violated regardless of whether Horn had recorded the conversation willfully. Therefore, to bar Perry from using the exclusionary rule simply because Horn accidentally recorded the conversation would be to ignore the purpose of the rule itself. The rule exists in part to protect a party from the harm of having his conversation recorded without his consent.[157] This harm will occur whether the conversation is recorded willfully or accidentally. It would make little sense to provide a remedy for this harm through the

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151. *Id.* at 301, 517 A.2d at 372 (barring the defendant from invoking the exclusionary rule when he consented to the recording of his conversation and then attempted to suppress the recording because all of the parties did not consent in accordance with the Act).

152. *Perry*, 357 Md. at 66, 741 A.2d at 1178.

153. *See* Sanders v. State, 57 Md. App. 156, 169, 469 A.2d 476, 483 (1984) (rejecting an interpretation of the Act that would make it impossible for authorized federal agents to intercept a communication in accordance with the Act).

154. *See Perry*, 357 Md. at 42-44, 741 A.2d at 1165-66.

155. *See* Mustafa v. State, 323 Md. 55, 74-75, 591 A.2d 481, 485-86 (1991) (explaining that the legislature intended to grant individuals the right to suppress a recording that was not made in Maryland, so long as it was recorded in violation of the Act).

156. *Id.* at 75, 591 A.2d at 486.

157. *Perry*, 357 Md. at 61, 741 A.2d at 1175.

exclusionary rule only if the recording is willful. The court avoided this illogical interpretation of the Act when it ruled that the "willfullness" requirement applies only to the *mens rea* required for the criminal or civil prosecution of the interceptor.[158]

The court made the correct decision even though a literal, narrow reading, as adopted by the State and Judge Rodowsky in his dissent, conceivably yields the opposite conclusion.[159] The State and the dissent used the following general steps to arrive at their conclusion: (1) The exclusionary rule bars the admission into evidence of a recording if such disclosure would be a violation of the Act; (2) section 10-402(a)(2) makes it unlawful to disclose a communication made in violation of the Act; (3) it is a violation of the Act to willfully intercept a communication; (4) Horn intercepted Perry's conversation inadvertently and not willfully; (5) Horn's interception was therefore not a violation of the Act; and (6) since the recording was not made in violation of the Act, Perry cannot use the exclusionary rule to suppress the recording.[160]

The majority departed from this approach at the second step. To determine what constitutes a lawful disclosure, it looked to section 10-407(c),[161] governing disclosure during testimony, rather than 10-402(a)(2).[162] The significant difference between the two sections of the statute is that section 10-407(c) makes it lawful to disclose contents of a recording if the recording was made "in accordance with" the Act, whereas section 10-402(a)(2) makes disclosure unlawful if the recording was made "in violation of" the Act. [163]

The majority correctly used this discrepancy to find that a willful recording is not necessary for the use of the exclusionary rule.[164] The term "in accordance with" connotes the idea that an action is per-

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158. *See id.* at 65-66, 741 A.2d at 1177-78.

159. *See id.* at 88-89, 741 A.2d at 1190 (Rodowsky, J., dissenting) (explaining his interpretation that a recording must be willful in order to allow use of the exclusionary rule); *Perry*, 357 Md. at 65, 741 A.2d at 1176 (reciting the State's argument as to why a recording must be willful in order to allow use of the exclusionary rule).

160. *Perry*, 357 Md. at 63, 741 A.2d at 1176; *id.* at 88-89, 741 A.2d at 1190 (Rodowsky, J., dissenting).

161. MD. CODE ANN., CTS. & JUD. PROC. § 10-407(c) (1999) (stating that disclosure during testimony is authorized if the communication was "intercepted in accordance with" the Act).

162. *Perry*, 357 Md. at 65, 741 A.2d at 1177; MD. CODE ANN., CTS. & JUD. PROC. § 10-402(a)(2) (stating that disclosure is unlawful if the communication was intercepted "in violation of" the Act).

163. MD. CODE ANN., CTS. & JUD. PROC. §§ 10-407(c) & 10-402(a)(2).

164. *Perry*, 357 Md. at 66, 741 A.2d at 1178.

formed in a way that conforms to the guidelines of the Act.[165] It is illogical to conclude that the taping of an individual's conversation without his consent, even if done unwillfully, would be "in accordance with" an act that requires the consent of all parties.[166] Therefore, the majority rightfully concluded that a defendant can suppress a non-consensual recording, even though it was intercepted unwillfully, because disclosure would not be lawful under section 10-407(c).[167]

The majority's reasoning creates the possibility for a situation in which a given recording will not be "in violation of" the Act, but will not be "in accordance with" the Act either.[168] For example, an individual who accidentally records a telephone conversation without the other party's consent has not violated section 10-402(a)(1), which requires willfullness to constitute a violation. The same recording, however, would not be in accordance with the Act, because all of the parties did not consent to the recording. This result is, in fact, consistent with a logical interpretation of the Act, although Judge Rodowsky disagreed with this interpretation in his dissent. He noted that the majority's decision essentially "[c]reates a limbo between the heaven of interceptions 'authorized by' or 'in accordance with' Subtitle 4 and the hell of conduct 'in violation of' Subtitle 4."[169]

This "limbo," however, is necessary and logical when the Act is examined as a whole. When assessing criminal and civil liability under the Act, it is logical to apply the *mens rea* of "willfullness" as section 10-402(a) specifies.[170] The majority stated that "conditioning such liability on a finding of willfulness is . . . entirely consistent with our general jurisprudential construct."[171] It is also logical and consistent with the purpose of the Act to ignore the willfullness of the interceptor when analyzing a violation for the purposes of the exclusionary rule.[172] The rule is designed to exclude non-consensual recordings from the Mary-

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165. "Accordance" is defined as "agreement; harmony." SCOTT FORESMAN, ADVANCED DICTIONARY 8 (1983).

166. *See* MD. CODE ANN., CTS. & JUD. PROC.§ 10-402(c)(3) (requiring the consent of all parties before an interception is lawful).

167. *Perry*, 357 Md. at 66, 741 A.2d at 1178.

168. *Id.* at 92, 741 A.2d at 1192 (Rodowsky, J., dissenting) (stating that, contrary to the majority's opinion, a given interception must either be a violation or a non-violation under all of the Act's subsections).

169. *Id.* (maintaining that, so far as admissibility is concerned, there are only two classes of interception under the Act—those that are in violation and those that are not in violation).

170. *See* MD. CODE ANN., CTS. & JUD. PROC. § 10-402.

171. *Perry*, 357 Md. at 66, 741 A.2d at 1177.

172. *See id.* at 66, 741 A.2d at 1178 (stating that the interceptor's mental state is of marginal relevance when the exclusionary rule is invoked).

land courts, which protect parties who have had their conversations recorded without their consent.[173] Such parties should be afforded this protection regardless of whether the interceptor acted willfully, because their privacy has been violated as a result of the recording, regardless of the interceptor's intent.[174] However, when the civil or criminal liability of an interceptor is at issue, his intent becomes relevant, so willfullness should be a prerequisite to finding such liability under the Act.[175] Therefore, it makes sense that a non-consensual, accidental recording may be lawful or unlawful under the Act, depending upon whether the interceptor is being prosecuted or an aggrieved party is attempting to invoke the exclusionary rule.

The dissent argued that a recording must either be found a violation under all provisions of the Act, or not a violation under all provisions of the Act.[176] Unfortunately, this argument focuses on circumstantial evidence gleaned from the federal act rather than an examination of the practical effect that such a statement would have on the application of Maryland's wiretapping act.[177]

To support its theory, the dissent turned to the language of section 10-407(d), which provides that "'[a]n otherwise privileged . . . communication intercepted in accordance with, or in violation of, the provisions of this subtitle, does not lose its privileged character.'"[178] With regard to this particular provision, the dissent may very well be correct that the "contradistinction" of the phrases "in accordance with" and "in violation of" are meant to cover the entire spectrum of interceptions, leaving no middle ground.[179] This provision, as the dissent pointed out, is borrowed from its counterpart in the federal wiretap act, which contains almost identical language.[180] However, the federal act does not have an all-party consent provision, so Congress did not need to consider the effect that this provision's language might have on a situation similar to Perry's.

It follows that when Maryland adopted section 10-407(d) of its wiretap act, the legislature did not contemplate the effect that phrases

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173. Mustafa v. State, 323 Md. 55, 74-75, 591 A.2d 481, 485-86 (1991).

174. *See Perry*, 357 Md. at 66, 741 A.2d at 1178.

175. *See id.*

176. *Id.* at 92, 741 A.2d at 1192 (Rodowsky, J., dissenting) ("Insofar as admissibility is concerned there are, in my view, only two classes of interceptions under [the Act]: those that are in violation and those that are not in violation.").

177. *See id.* at 88-95, 741 A.2d at 1189-93.

178. *Id.* at 93, 741 A.2d at 1192 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 10-407(d) (1999)).

179. *Id.*

180. *Id.*; *see* 18 U.S.C. § 2517(4) (1994).

like "in accordance with" and "in violation of" might have on cases like *Perry*. The language of section 10-407(d), which does not even concern the exclusionary rule, might indicate that an interception must be labeled exclusively a violation or a non-violation, for purposes of that provision alone. However, when the Act is read as a whole and the all-party consent provision is considered, it is logical to infer that a non-consensual, accidental recording should be considered a violation for purposes of the exclusionary rule, even though the same recording might not be a violation when the interceptor is being prosecuted.

5. Conclusion.—The majority correctly decided both the "co-conspirator" and "willfullness" issues by interpreting the Maryland Wiretapping and Electronic Surveillance Act in accordance with the Act's all-party consent provision. The court recognized that the statements of the legislature and previous Maryland courts dictate that a criminal defendant may benefit from the all-party consent provision through his use of the exclusionary rule, so long as this use does not upset the fundamental purpose of the Act. However, the court's holding with respect to the "co-conspirator" issue is problematic because its language will potentially allow defendants to use the exclusionary rule in situations where such use should not be permitted. Specifically, the language in *Perry* suggests that a defendant may use the rule when his conversation is recorded by his co-conspirator, even when the conversation occurred in furtherance of the conspiracy.

BENJAMIN J. RUBIN

C. *Narrowing a Defendant's Right to Challenge the Voluntariness of His Confession*

In *Baynor v. State*,[1] the Court of Appeals considered whether the State must disclose essentially a verbatim recording of a criminal defendant's interrogation prior to trial under Maryland Rule 4-263.[2] The court responded in the negative, finding that the language of the Rule did not support such a broad reading, and that, in adopting the Rule, the court had not intended to place this type of burden on the State.[3] The court further reasoned that a rule requiring the police to electronically record all statements obtained during a custodial interrogation was an issue more appropriate for the legislature to determine.[4] The *Baynor* court also considered whether a criminal defendant is entitled to place before the jury the complete circumstances of his interrogation as evidence relevant to the voluntariness of his confession, including evidence that the police told him that he could summarily be put to death.[5] The court found that the jury had sufficient information from all the existing evidence to determine from the totality of the circumstances that Baynor's confession was made voluntarily.[6] Thus, the trial court did not err when it limited the defense's cross-examination of the detective who conducted the original interrogation.[7]

Although the court correctly concluded that the defendant did not have a constitutional right to a verbatim recording of his full interrogation, it unnecessarily narrowed the defendant's right to elicit specific testimony. This finding leaves the voluntariness of defendants' confessions open to scrutiny and condones trial court decisions to limit the defense's ability to present its theory of the case.

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1. 355 Md. 726, 736 A.2d 325 (1999).

2. Rule 4-263, derived from former Maryland Rule 741a(1) & (2), provides in pertinent part:

> (a) *Disclosure without request.* Without the necessity of a request, the State's Attorney shall furnish to the defendant:
>
> (1) Any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged;
>
> (2) Any relevant material or information regarding: (A) specific searches and seizures, wire taps or eavesdropping, (B) the acquisition of statements made by the defendant to a State agent that the State intends to use at a hearing or trial, and (C) pretrial identification of the defendant by a witness for the State.

MD. R. 4-263; *see also Baynor*, 355 Md. at 734, 738, 736 A.2d at 329, 331.

3. *Baynor*, 355 Md. at 737, 736 A.2d at 331.

4. *Id.* at 740, 736 A.2d at 332.

5. *Id.* at 734-35, 736 A.2d at 329.

6. *Id.* at 741-43, 736 A.2d at 333-34.

7. *Id.*

1. The Case.—On February 1, 1996, Gary Baynor and an accomplice attempted to rob Dion Williams and Marvin Nock at the 3300 block of Edgewood Street in Baltimore City.[8] One of the intended victims produced and fired a gun.[9] Baynor and his accomplice also produced guns and returned fire.[10] Williams was struck four times, once in the chest, and later died from his injuries.[11] Nock was shot three times and survived.[12] After he was discharged from the hospital, Nock assisted homicide detectives in preparing a composite of the shooting suspects.[13] Nock ultimately identified Baynor from a photo array.[14] Baynor was then arrested on charges of death-eligible first-degree murder, attempted first-degree murder, assault with intent to murder, and use of a handgun in the commission of a crime of violence.[15]

Following his arrest, Detectives Michael Glenn and Wayne Jones interviewed Baynor in the Homicide Unit at Baltimore City Police Headquarters.[16] The detectives informed Baynor that he was charged with murder.[17] In response to a question posed by Baynor regarding the possible penalty for murder, Detective Glenn responded that he could receive either life imprisonment or the death penalty.[18] The detectives then took Baynor to be photographed and obtained his identifying information.[19] From 1:10 to 1:28 p.m., Baynor was advised of his *Miranda* rights and completed an explanation-of-rights form,

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8. *Id.* at 730, 732, 736 A.2d at 327, 328.
9. *Id.* at 732, 736 A.2d at 328.
10. *Id.*
11. *Id.* at 730, 736 A.2d at 327.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* In a footnote, the court set out the two statements made by Detective Glenn at the suppression hearing regarding the possibility of the death penalty. *Id.* at 730 n.2, 736 A.2d at 327 n.2. The first was as follows:

> "Q. It's true there was a question posed to you by my client in a hypothetical fashion, isn't that correct?
> "A. Your client asked me what he can receive for this crime.
> "Q. And, what did you answer?
> "A. He can be put to death summarily or life.
> "A. . . . When your client was brought over to Baltimore City Police Department Homicide Unit he was—he asked why he was brought over. I told him for a homicide. He was under arrest for a homicide. He asked me what he could receive for a homicide and I said under the State of Maryland he could receive life or the death penalty. That was it, sir.

Id.

19. *Id.* at 731, 736 A.2d at 327.

acknowledging that he fully understood his rights and was freely and voluntarily willing to answer questions without the presence of counsel.[20] The interview began at 1:28 p.m. and concluded at 3:21 p.m.[21] In an audio tape-recorded statement that began at 3:12, Baynor admitted that he shot Williams and Nock.[22]

Baynor was indicted, and at the first appearance of his counsel, the State disclosed that Baynor had made a taped confession.[23] Thereafter, the tape and a transcript were made available to the defense.[24] The following month, Baynor's counsel requested, pursuant to Maryland Rule 4-263, that the State provide "'any relevant material or information regarding the acquisition of statements made by the defendant,' and the substance of each oral statement made by Baynor to a state agent that the State intended to use at hearing or trial."[25]

During a pre-trial hearing, the defendant moved to suppress the recorded statement, arguing that the defense was entitled to a copy of Baynor's unrecorded exculpatory statements.[26] The defendant contended that, absent a report containing the substance of his exculpatory oral statements, the hearing court and the jury could not properly assess the voluntariness of the recorded inculpatory statement.[27]

The trial court denied the motion to suppress, finding that the State had satisfied its burden of proof with regard to the voluntariness of the confession.[28] The case was tried before a jury, which ultimately convicted Baynor of the second-degree murder of Williams, the attempted second-degree murder of Nock, two counts of use of a handgun in the commission of a crime of violence, and two counts of unlawful possession of a handgun.[29] The trial court sentenced the defendant to one hundred years' incarceration.[30] Baynor appealed to

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20. *Id.*, 736 A.2d at 327-28; *see* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

21. *Baynor*, 355 Md. at 731, 736 A.2d at 328.

22. *Id.*

23. *Id.* at 733, 736 A.2d at 329.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 733-34, 736 A.2d at 329. Baynor cited Maryland Rule 4-263(b)(2)(B) and *Brady v. Maryland*, 373 U.S. 83 (1963), in support of his argument. *Id.* at 733-36, 736 A.2d at 329-30. *Brady* stands for the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87.

28. *Baynor*, 355 Md. at 734, 736 A.2d at 329 (noting that both detectives, as well as the defendant, were examined by the defense at the suppression hearing).

29. *Id.*

30. *Id.*

the Court of Special Appeals, which affirmed the trial court's decision in an unreported opinion.[31]

The Court of Appeals granted certiorari to consider: (1) whether the defendant was entitled to pre-trial disclosure of the entire circumstances of his interrogation, including exculpatory statements, and (2) whether the defendant was entitled to present evidence of the entire circumstances of his interrogation before the jury as evidence relevant to the voluntariness of his confession.[32]

2. Legal Background.—

a. Determining Voluntariness.—Under Maryland law, a court must determine that a confession is voluntary before it can be admitted into evidence.[33] In making this determination, the court, and later the jury, apply a "totality of the circumstances" test.[34] In assessing the voluntariness of the defendant's statements, the court considers whether the statement was "induced by force, undue influence, [or] improper promises."[35]

The law in Maryland regarding the voluntariness of confessions is rooted in non-constitutional law.[36] Maryland employs a two-pronged test to determine the voluntariness of a defendant's confession.[37] First, the judge, outside the presence of the jury, makes a determination of voluntariness as a mixed question of law and fact.[38] If the

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31. *Id.*

32. *Id.* at 734-35, 736 A.2d at 329. The court also considered whether a criminal defendant at a suppression hearing is entitled to pre-trial disclosure of evidence of the entire circumstances of that interrogation and to offer such evidence when the State seeks to introduce a statement that resulted from that interrogation. *Id.* at 734, 736 A.2d at 329.

33. Hillard v. State, 286 Md. 145, 151, 406 A.2d 415, 419 (1979).

34. Hof v. State, 337 Md. 581, 595-96, 655 A.2d 370, 377 (1995) (citing Reynolds v. State, 327 Md. 494, 508-09, 610 A.2d 782, 789 (1992)).

35. *Id.* at 596, 655 A.2d at 378 (articulating the factors to be considered in determining whether a statement was made voluntarily); *see also* Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (upholding the state court's determination that the defendant's confession was coerced and not made voluntarily when there was a credible threat of violence and when a state agent promised the defendant protection).

36. *See Hillard*, 286 Md. at 150, 406 A.2d at 418 (stating that "regardless of constitutional strictures," for more than one hundred years, Maryland courts have held that, in order to be admissible, a confession must "be shown to be free of any coercive barnacles"). Maryland non-constitutional law is the common law of Maryland as established through judicial opinions. *See Hof*, 337 Md. at 595 (describing the voluntariness standard for confessions under Maryland's common law); Hoey v. State, 311 Md. 473, 483, 536 A.2d 622, 627 (1988) (describing the voluntariness standard under Maryland non-constitutional law as identical to the common-law approach).

37. *See Hillard*, 286 Md. at 151, 406 A.2d at 419 (explaining the process for determining whether a confession was given freely and voluntarily).

38. *Id.*

judge determines that the confession is voluntary, it is admitted into evidence, and the jury evaluates the question of voluntariness.[39] The standard for determining whether a confession was made voluntarily is "whether, under the totality of all the circumstances, the statement was given freely and voluntarily."[40] Factors relevant to the totality of the circumstances include where the interrogation was conducted,[41] its length,[42] who was present,[43] how it was conducted,[44] its content,[45]

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39. *Id.*

40. *Hof*, 337 Md. at 595, 655 A.2d at 377 (internal quotation marks omitted) (quoting Gilliam v. State, 320 Md. 637, 650, 579 A.2d 744, 750 (1990) (explaining that physical ailments or drug use will not necessarily make inadmissible a confession that is "freely and voluntarily given at a time when the accused understands what he is saying")).

41. *See id.* at 596, 655 A.2d at 377-78 (citing Burton v. State, 32 Md. App. 529, 534, 363 A.2d 243, 246 (1976) (finding that the questioning at a police station of someone who may have information regarding a crime is not enough to create custody); Bernos v. State, 10 Md. App. 184, 186-87, 268 A.2d 568, 570 (1970) (finding that a police officer asking the defendant "what happened" while at the defendant's home did not constitute an interrogation because defendant was not under arrest and was free to leave); Shedrick v. State, 10 Md. App. 579, 583, 271 A.2d 773, 775-76 (1970) (finding a custodial situation requiring complete *Miranda* warnings where the defendant made his statement in the presence of two detectives in a small separate room immediately adjacent to a hospital emergency room where the victim lay in grave condition)).

42. *See id.*, 655 A.2d at 378 (citing Hines v. State, 58 Md. App. 637, 658, 473 A.2d 1335, 1345-46 (1984) (finding that the defendant's statements were made voluntarily despite the fact that his interrogation was over fifteen hours long and he was given breaks only to eat or to go to the bathroom); Finke v. State, 56 Md. App. 450, 488, 468 A.2d 353, 373 (1983) (finding that the defendant confessed voluntarily because, although he was questioned throughout the night and early morning hours, and was questioned in "relays" allowing only the officers to rest, the defendant was not under arrest and was free to leave at any time)).

43. *See id.* (citing Cummings v. State, 27 Md. App. 361, 373-74, 341 A.2d 294, 302-03 (1975) (finding that the presence of the defendant's wife during interrogation rendered the interview non-custodial)).

44. *See id.* (citing Combs v. State, 237 Md. 428, 435, 206 A.2d 718, 722 (1965) (finding a defendant's confession involuntary where the defendant, who had an "apparent intellectual deficiency or emotional unbalance or both, with a pathological fear of confinement in a cell was . . . physically hurt because he would not talk and psychologically at a disadvantage due to immediate confinement . . . and the threat of further confinement lasting until he did talk"); Clarke v. State, 3 Md. App. 447, 450-51, 240 A.2d 291, 294 (1968) (finding that an "interrogation" consisting of questions regarding the defendant's name, address, and place of employment did not create an atmosphere intended to overpower defendant's will contrary to the dictates of *Miranda*)).

45. *See id.* (citing Johnson v. State, 303 Md. 487, 513, 495 A.2d 1, 14 (1985) (finding that the defendant's assertion during his interrogation that he was willing to take a polygraph test supported the statements made in his confession); Bowers v. State, 298 Md. 115, 129-30, 468 A.2d 101, 108 (1983) (finding that the defendant asking police what would happen to him was not an interrogation because the defendant initiated the conversation with police and the officers only listened); Radovsky v. State, 296 Md. 386, 401, 464 A.2d 239, 247 (1983) (reversing the defendant's conviction because his inculpatory statements were made during a police interrogation that was conducted after he had requested counsel but before counsel could be reached)).

whether the defendant was given *Miranda* warnings,[46] the mental and physical condition of the defendant,[47] the age, experience, education, character, and intelligence of the defendant,[48] when the defendant was taken before a court commissioner following arrest,[49] whether the defendant was physically mistreated,[50] physically intimidated, or psychologically pressured,[51] and whether the defendant was under the influence of drugs.[52] Ultimately, the trier of fact must determine, beyond a reasonable doubt, whether a confession was made voluntarily.[53]

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46. *See id.* (citing State v. Kidd, 281 Md. 32, 36, 375 A.2d 1105, 1108 (1977) (finding that "*Miranda* impressed procedural safeguards on the traditional test of voluntariness"); Cunningham v. State, 58 Md. App. 249, 261-62, 473 A.2d 40, 46 (1984) (rejecting the defendant's claim of involuntariness based on his assertion that, after being given his *Miranda* warnings, he confessed based on a promise of cooperation with regard to bail); Thomas v. State, 3 Md. App. 101, 104, 238 A.2d 558, 561 (1968) (finding that the failure to advise the defendant of his right to have an attorney present during the interrogation and of his right to have an attorney appointed for him if he could not afford one rendered the use of his confession constitutionally impermissible)).

47. *See id.* at 596-97, 655 A.2d at 378 (citing Dempsey v. State, 277 Md. 134, 150-54, 355 A.2d 455, 463-65 (1976) (finding that evidence of a defendant's drinking and intoxication was sufficient to raise a legitimate jury issue as to the voluntariness of a confession); Mundell v. State, 244 Md. 91, 93, 223 A.2d 184, 185 (1966) (finding that the defendant was rational and coherent, and that his confession was made voluntarily despite the fact that he appeared to be semi-conscious at his arrest, that he was crying when he was about to be released from the hospital, and that he was depressed and had been drinking); *Combs*, 237 Md. at 435, 206 A.2d at 721-22 (finding that a confession was made involuntarily where the defendant had an intellectual deficiency or emotional unbalance and was physically harmed until he talked)).

48. *See id.* at 597, 655 A.2d at 378 (citing *Combs*, 237 Md. at 435, 206 A.2d at 721-22 (noting the defendant's low level of intelligence as a factor in determining the voluntariness of his confession)).

49. *See id.* (citing MD. CODE ANN., CTS. & JUD. PROC. § 10-912(b) (1989); Woods v. State, 315 Md. 591, 613, 556 A.2d 236, 247 (1989) (finding the fact that eight and one-half hours elapsed between the defendant's arrest and his appearance before a judicial officer did not render his confession involuntary); Simkus v. State, 296 Md. 718, 727, 464 A.2d 1055, 1061-62 (1983) (dismissing the defendant's voluntariness challenge because the defendant waived his right to prompt presentment)).

50. *See id.* (citing Lodowski v. State, 307 Md. 233, 255, 513 A.2d 299, 311 (1986) (explaining that, when using the totality of the circumstances test for determining voluntariness, physical mistreatment includes depriving a prisoner of food, drink, or rest)).

51. *See id.* (citing *Combs*, 237 Md. at 435, 206 A.2d at 721-22 (finding that the defendant's confession was made involuntarily because he was physically and verbally intimidated until he talked)).

52. *See id.* (citing Campbell v. State, 240 Md. 59, 63-64, 212 A.2d 747, 750 (1965) (holding that a statement made by the defendant while under the influence of a pain-deadening drug was admissible if given voluntarily); Bryant v. State, 229 Md. 531, 535-36, 185 A.2d 190, 192-93 (1962) (finding that confessions made while under the influence of self-administered narcotics are not per se involuntary)).

53. Hillard v. State, 286 Md. 145, 151, 406 A.2d 415, 419 (1979). The Maryland Criminal Pattern Jury Instructions define reasonable doubt as

After making this determination under Maryland common law, the court must also determine whether the confession was voluntary under the Due Process Clause of the Fourteenth Amendment to the United States Constitution[54] and Article 22 of the Maryland Declaration of Rights,[55] and whether the obtained confession conformed with *Miranda*'s requirements. The State bears the burden of proving the voluntariness of a confession by a preponderance of the evidence.[56] The defendant must object in order to trigger the State's burden.[57]

The Court of Appeals has promulgated procedural rules to aid the trial court and the jury in determining voluntariness. Specifically, Maryland Rule 4-263 requires that the State furnish the defendant with "[a]ny relevant material or information regarding . . . the acquisition of statements made by the defendant to a state agent that the State intends to use at a hearing or trial."[58] In *Warrick v. State*,[59] the court noted that material required to be disclosed is limited to the subject matter described in the Rule, "material and information in the possession or control" of the State or its agents, and relevant information.[60] In attempting to comply with the Rule, the State often provides the defense with an audio tape of the confession or other incriminating evidence that it intends to use at trial.[61]

> a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. However, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

MARYLAND PATTERN JURY INSTRUCTIONS-CRIMINAL § 2:02, at 18 (MICPEL 1999); *see also Hof*, 337 Md. at 597, 655 A.2d at 378 (noting that while no one factor is determinative, they should all be considered within the context of the situation).

54. The Fourteenth Amendment states that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

55. The Maryland Declaration of Rights provides "[t]hat no man ought to be compelled to give evidence against himself in a criminal case." MD. CONST. DECL. OF RTS. art. 22.

56. *Hof*, 337 Md. at 605, 655 A.2d at 382.

57. *Id.* at 606, 655 A.2d at 382.

58. MD. R. 4-263(B); *see also supra* note 2 and accompanying text (providing the full text of the Rule).

59. 302 Md. 162, 486 A.2d 189 (1985).

60. *Id.* at 170, 486 A.2d at 193 (internal quotation marks omitted).

61. *Cf.* Wayne T. Wrestling & Vicki Waye, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493, 509 (1998) (observing that "over half of the nation's police agencies use video technology for some things, even if that use does not include recording of interrogations" (footnote omitted)).

b. Due Process and Verbatim Recordings.—In many states, it is common practice for the police to record the confessions of suspects.[62] Several states have even required that the entire interrogation be recorded.[63] In a leading case on point, *Stephan v. State*,[64] the Alaska Supreme Court held that recording the entire interrogation "is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible."[65] The Alaska court concluded that this type of thorough recording is "a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial."[66] Essentially, the court deemed the preservation of all statements made by the defendant during the course of an interrogation a necessary component of the voluntariness determination.[67] The *Stephan* court acknowledged, however, that its holding was based entirely on the Alaska Constitution, which provides for greater protection than the United States Constitution.[68]

Other states have followed Alaska's lead with respect to complete recordings of interrogations. Minnesota, for example, mandated recordings of interrogations when feasible, and always "when questioning occurs at a place of detention."[69] The Minnesota court based its holding on its "supervisory power to insure the fair administration of justice," not on the state constitution.[70] Prior to announcing these

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62. *See id.* (noting that a 1992 National Institute of Justice study revealed that "a number of police agencies throughout the United States regularly videotaped all or portions of the interrogation process").

63. *See, e.g.*, Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985) (requiring the electronic recording of the entire interrogation of a criminal defendant, including the communication of the accused's *Miranda* rights); Smith v. State, 548 So. 2d 673, 674 (Fla. Dist. Ct. App. 1987) (finding that the recording of interrogations is a requirement of state due process when the interrogation occurs in a place of detention and recording is feasible); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (citing *Stephan* with approval and requiring the recording of the full interrogation of criminal defendants under the court's supervisory powers).

64. 711 P.2d 1156 (Alaska 1985).

65. *Id.* at 1159.

66. *Id.* at 1159-60.

67. *See id.* at 1161 (noting that "[t]he contents of an interrogation are obviously material in determining the voluntariness of a confession").

68. *See id.* at 1160 (finding that "custodial interrogations need not be recorded to satisfy the due process requirements of the United States Constitution, because a recording does not meet the standard of constitutional materiality recently enunciated by the United States Supreme Court" (citing California v. Trombetta, 467 U.S. 479 (1984))).

69. State v. Scales, 518 N.W.2d 587, 592, 594 (Minn. 1994); *see also* Smith v. State, 548 So. 2d 673 (Fla. Dist. Ct. App. 1987) (citing *Stephan* with approval).

70. *Scales*, 518 N.W.2d at 594.

mandates, courts in both Alaska and Minnesota had urged the police to record interrogations.[71]

A large majority of states, however, have declined to hold that state due process requires mandatory recordings of police interrogations.[72] Indeed, some courts have felt "constrained from establishing a recording requirement, either by a policy to not interpret a state constitution differently than the U.S. Constitution, or in deference to the legislature."[73]

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71. In *Stephan*, the Alaska Supreme Court cited three prior cases where that court had held that tape recording of confessions was necessary. *Stephan*, 711 P.2d at 1157 (citing Mallott v. State, 608 P.2d 737, 743 n.5 (Alaska 1980) ("[I]t is incumbent upon [law enforcement] to tape record, where feasible, any questioning and particularly that which occurs in a place of detention."); S.B. v. State, 614 P.2d 786, 790 n.9 (Alaska 1980) (noting that electronic recordings would be a beneficial aid to the court's determination of the voluntariness question); McMahan v. State, 617 P.2d 494, 499 n.11 (Alaska 1980) (noting that "if *Miranda* rights are read to the defendant, this too should be recorded")).

The Minnesota Supreme Court also cited two prior cases that concerned the failure of law enforcement officers to record custodial interrogations. *Scales*, 518 N.W.2d at 591 (citing State v. Pilcher, 472 N.W.2d 327, 333 (Minn. 1991) (urging the use of electronic recordings and noting that "[l]aw enforcement personnel and prosecutors may expect that this court will look with great disfavor upon any further refusal to heed these admonitions"); State v. Robinson, 427 N.W.2d 217, 244 n.5 (Minn. 1988) (observing that "disputes arising from an accused's claim of denial of constitutional rights could be obviated if police interrogators would record all conversations with the accused relative to the accused's constitutional rights as required by *Miranda v. Arizona*")).

72. *See, e.g.*, People v. Raibon, 843 P.2d 46, 48-49 (Colo. 1993) (rejecting the recording requirement based on a lack of state supreme court precedent or legislation on the topic); State v. Kekona, 886 P.2d 740, 745-46 (Haw. 1994) (rejecting mandatory recording but stressing the importance of recording when feasible); State v. Rhoades, 809 P.2d 455, 462 (Idaho 1991) (declining to adopt a recording requirement and refusing an invitation to adopt the reasoning of *Stephan*); Stoker v. State, 692 N.E.2d 1386, 1390 (Ind. 1998) (declining to impose mandatory recording, but stating that "we discern few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention"); Commonwealth v. Fryar, 610 N.E.2d 903, 909-10 n.8 (Mass. 1993) (rejecting mandatory recording of interrogations but noting that all parties involved would benefit from such a recording); State v. Buzzell, 617 A.2d 1016, 1018-19 (Me. 1992) (rejecting a recording requirement as not essential to ensure a fair trial and not required by due process); People v. Fike, 577 N.W.2d 903, 906 (Mich. Ct. App. 1998) (holding that the due process clause of Michigan's constitution does not require electronic recording of custodial interrogations); Jiminez v. State, 755 P.2d 694, 696-97 (Nev. 1989) (rejecting mandatory recording of interrogations); State v. Gorton, 548 A.2d 419, 422 (Vt. 1988) (rejecting the recording requirement as not required by due process and as better left to the legislature); State v. Spurgeon, 820 P.2d 960, 963 (Wash. 1991) (rejecting mandatory recording of interrogations based on identical language of the state and federal due process clauses and the court's view that such sweeping changes in police practice require a full hearing of all policy and financial implications); State v. Kilmer, 439 S.E.2d 881, 893 (W. Va. 1993) (declining to expand the due process clause of the state constitution to require electronic recording of interrogations, but encouraging such recording when feasible).

73. Wrestling & Waye, *supra* note 61, at 513-18 (referring to the holdings of cases from various jurisdictions that have addressed the issue of verbatim recordings).

c. Controlling the Scope of Cross-Examination.—Maryland case law has firmly established that the trial judge has broad discretion in controlling the scope of cross-examination.[74] In *Corens v. State*,[75] the court held that "the method, scope and extent of cross-examination are within the trial judge's discretion" and will not be interfered with absent abuse of that discretion.[76]

In *Ebb v. State*,[77] the court devised a test for determining whether the trial judge had abused his discretion in controlling cross-examination[78]—whether the "limitations placed upon cross-examination inhibit the ability of the defendant to receive a fair trial."[79] If the limitations prejudice the defendant's right to a fair trial, the "general rule vesting the court with discretion to disallow the inquiry does not apply"[80] and the judge must balance the probative value of the proposed evidence against its likely prejudicial effect.[81] On appeal, the abuse of discretion standard protects against those errors in controlling cross-examination that are prejudicial to the defense.

3. The Court's Reasoning.—In *Baynor v. State*, the Court of Appeals held that Rule 4-263 did not require electronic recordings or verbatim accounts of a custodial interrogation, and that the trial court did not err when it limited the defense in eliciting facts during cross-examination regarding the entire circumstances of the interrogation.[82] Writing for the majority, Judge Rodowsky, joined by Judges Wilner, Cathell, and Karwacki,[83] articulated factors which, when taken together, are sufficient to meet Rule 4-263(a)(2)(B)'s "relevant material or information" requirement for involuntary disclosure of a statement.[84] Additionally, the court rejected the defendant's argument that Rule 4-263 requires the police to produce a verbatim recording of

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74. Beasley v. State, 271 Md. 521, 527-28, 318 A.2d 501, 504 (1974) (citing Long v. State, 7 Md. App. 256, 254 A.2d 707 (1969)).

75. 185 Md. 561, 45 A.2d 340 (1946).

76. *Id.* at 566, 45 A.2d at 344; *see also Beasley*, 271 Md. at 527-28, 318 A.2d at 504 (affirming the concept of wide discretion of the trial court to control cross-examination).

77. 341 Md. 578, 671 A.2d 974 (1996).

78. *Id.* at 587-88, 671 A.2d at 978.

79. *Id.* at 588, 671 A.2d at 978.

80. *Id.*

81. *Id.*

82. *Baynor*, 355 Md. at 740, 743, 736 A.2d at 332, 334.

83. Judge Karwacki, a retired judge, was specially assigned to hear the case. *Id.* at 729, 736 A.2d at 326.

84. *Id.* at 737, 736 A.2d at 330-31 (internal quotation marks omitted); *see also supra* note 2 and accompanying text (providing the full text of Maryland Rule 4-263(a)(2)(B)).

an interrogation,[85] noting that such a shift in police procedure was for the legislature to decide.[86]

In disposing of the defendant's argument that his confession was involuntary because of false advice given by the detectives, the court found that Baynor's involuntariness claim failed because he had the opportunity to establish, through his own testimony, that he had been told by one of the detectives that he was facing the death penalty.[87] In so holding, the court rejected Baynor's argument that the trial judge impermissibly limited cross-examination by not allowing counsel to elicit the exact words used by the detective.[88] The court noted that "Baynor had ample opportunity at the suppression hearing to develop his acts, conduct, and words through the examination of Detective Glenn and through two prior efforts at Detective Jones before Baynor was cut off."[89] With respect to the trial proceedings, the court found that "Baynor never put the question squarely to Glenn about summary capital punishment."[90] Therefore, the court did not reach the legal question of whether false advice about a possible penalty renders a confession involuntary as a matter of law.[91] The court also found that

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85. *Baynor*, 355 Md. at 737, 736 A.2d at 331 ("There is no requirement that the State disclose essentially a verbatim account of a custodial interrogation that ultimately results in an oral inculpatory statement.").

86. *Id.* at 740, 736 A.2d at 332. The court cited with approval the rationale used by the Vermont Supreme Court in *Gorton v. State*, which explained that "[t]he most appropriate means of prescribing rules to augment citizens' due process rights is through legislation. In the absence of legislation, we do not believe it appropriate to require, by judicial fiat, that all statements taken of a person in custody be tape-recorded." *Id.* (internal quotation marks omitted) (quoting Gorton v. State, 548 A.2d 419, 422 (Vt. 1988)).

87. *Id.* at 740-41, 736 A.2d 332-33; *see also supra* note 18 (quoting Detective Glenn's testimony at Baynor's suppression hearing in which he stated that he told Baynor that he could be summarily put to death).

88. *Baynor*, 355 Md. at 748-49, 736 A.2d at 337.

89. *Id.* at 743, 736 A.2d at 334. Baynor was specifically asked what Detective Glenn advised him with regard to the death penalty, and his response was:

> A. Okay. Before we even got started I was being threatened verbally by words and harassed.
>
> Q. What were the threats?
>
> . . .
>
> A. He was threatening me as far as death penalty.

Record at Vol. II, 126. Baynor never mentioned the detective's use of the term "summarily." *See id.*

90. *Baynor*, 355 Md. at 749, 736 A.2d at 337.

91. *Id.* at 748, 736 A.2d at 337 (explaining that if Baynor had proved at trial that Detective Glenn advised him that he could summarily receive the death penalty, the trial judge would have addressed the issue of whether such advice rendered the confession involuntary as a matter of law).

Baynor failed to show that the trial judge had denied him the opportunity to establish a factual basis for advancing that argument.[92]

In a dissenting opinion, Judge Raker, joined by Chief Judge Bell and Judge Eldridge, opined that "the court abused its discretion at the jury trial of Baynor in limiting the defense examination of the detective who obtained the confession."[93] The dissent expressed dissatisfaction with the court's conclusion that Detective Glenn's statement regarding a summary death sentence would not have affected the jury's voluntariness determination.[94] The dissent also criticized the majority's conclusion "that [Baynor] was not prejudiced because he testified at the suppression hearing, thus adducing evidence of all the circumstances of the interrogation that he considered relevant and that he had the right and opportunity to do so at trial, but chose not to exercise that right."[95] Similarly, the dissenters disagreed with the majority's conclusion that defense counsel could have elicited the detective's exact words using a more effective examination technique.[96] Judge Raker noted that the defense's failure to employ available strategies, which the majority viewed as more effective than those actually employed, should not preclude the defendant from challenging the voluntariness of his confession.[97] The dissent concluded that, "[b]ecause the jury never heard this critical information, [Baynor] was denied under Maryland non-constitutional law his right to place before the jury evidence of the complete circumstances of the police interrogation."[98]

4. Analysis.—In *Baynor*, the Court of Appeals applied Rule 4-263 and Maryland case law to determine what the State is required to disclose to criminal defendants.[99] In construing Rule 4-263 to only apply to the recorded inculpatory statement that the State intended to use at trial, and not to any unrecorded exculpatory statements initially given by the defendant during his interrogation, the *Baynor* court imposed a substantial evidentiary hurdle for defendants who wish to challenge the voluntariness of their confessions. This narrow con-

92. *Id.* at 749, 736 A.2d at 337.

93. *Id.* (Raker, J., dissenting).

94. *Id.* at 749-50, 736 A.2d at 337; *see also supra* note 18 and accompanying text (quoting Detective Glenn's testimony at the suppression hearing).

95. *Baynor*, 355 Md. at 750, 736 A.2d at 338 (Raker, J., dissenting).

96. *Id.* at 751, 736 A.2d at 338 (noting that "[w]hile a leading question or impeachment with prior testimony may have been a wise strategy, it is not required trial practice").

97. *Id.*

98. *Id.*

99. *Baynor*, 355 Md. at 735-40, 736 A.2d at 329-32.

struction of Rule 4-263 creates an imbalanced application of the totality of the facts, which ultimately prevents the jury from making a fully informed determination as to the voluntariness of a defendant's confession. Furthermore, by finding that the trial court did not abuse its discretion in limiting the defense's cross-examination of a material State witness, the court created a difficult situation for defendants: they can choose either to invoke the Fifth Amendment right against self-incrimination or to waive that right to inform the jury about the complete circumstances of the interrogation.

a. Rule 4-263 and the Court's Imbalanced Application of the Totality-of-the-Facts Test.—The *Baynor* court explained, at great length, the purpose of Rule 4-263, which is "to force the accused to file any motions to suppress [inculpatory statements] in advance of [a] trial on the merits."[100] Thus, by implication, the court rejected Baynor's contention that the rule was designed to require the State to produce a verbatim recording of the defendant's interrogation. The court also delineated important limitations on the rule, most notably, that the State must disclose information regarding only those statements made by the defendant that the State intends to use at trial.[101] The court's narrow construction of the Rule meant that the State was not obligated to disclose either Baynor's recanted exculpatory statements or the total circumstances surrounding his confession.

The court's lack of concern for recanted exculpatory statements reflects a common-sense awareness by the court that many suspects deny involvement in the crimes for which they are charged. These denials are most likely motivated by a desire to avoid incarceration, a belief that the police will look elsewhere for a suspect, or any number of other reasons having nothing to do with actual innocence. Those exculpatory statements that the prosecution does not intend to use, absent signs of threats or inducements, are therefore not relevant at trial. The Rule, by its plain language, does not require the State to produce evidence of recanted exculpatory statements and the court's

100. *Id.* at 736, 736 A.2d at 330 (quoting Bailey v. State, 303 Md. 650, 655, 496 A.2d 665, 667 (1985)).

101. *Id.* at 736-37, 736 A.2d at 330-31. The court presumably limited the disclosure requirement to those statements the State intended to use at trial in an attempt to limit the issues to those likely to have some bearing on the outcome of the trial. The questions essentially turned on the relevance of the statements at issue. *See id.* at 736, 736 A.2d at 330. Because the State did not believe Baynor's recanted exculpatory statements, the content of those statements "simply would not be relevant to the statement that the State actually intended to use." *Id.* at 331, 736 A.2d at 737.

narrow construction of the Rule satisfies its underlying purpose of providing discovery of relevant information.[102]

While the court's holding and its interpretation of Rule 4-263 are correct as applied to the recanted exculpatory statements, the court's construction of the Rule prevents the jury from being fully informed as to the entire circumstances surrounding the making of inculpatory statements. The jury in *Baynor* was not privy to all the information that was relevant to a voluntariness determination.[103] Thus, Rule 4-263 creates an impossible situation; the State should not have to produce irrelevant statements but the defendant should be entitled to use any admissible evidence that may negate his guilt. While the substance of Baynor's exculpatory statements was not relevant, the circumstances surrounding them were relevant to the jury's determination of voluntariness. Had the State been required to produce information regarding the circumstances surrounding Baynor's exculpatory statements, the jury would have been able to consider the length of time that Baynor had maintained his innocence and any statements or actions on the part of the detectives that may have caused him to recant his confession. The circumstances surrounding Baynor's shift from asserting his innocence to confessing his guilt were relevant to Baynor's argument that his subsequent confession was made involuntarily.[104]

The court noted that under the Rule, the State is required to disclose threats to the defendant, and that the absence of threats or inducements in the State's disclosure meant that none existed in Baynor's case.[105] The court then concluded that recorded interrogations are not necessary for compliance with Rule 4-263.[106] However, in *Baynor*, a verbatim recording not only would have revealed Baynor's exculpatory statements, but more importantly, it would have conclusively established whether he was told by a state agent that he could "summarily" be put to death.[107] Moreover, a recording would also be an important aid for the jury in determining whether the detective's

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102. *See* MD. R. 4-263.

103. *Baynor*, 355 Md. at 749, 736 A.2d at 337 (Raker, J., dissenting) (observing that "the jury never learned that the detective falsely informed Petitioner that he was subject to being put to death summarily for the murder of Dion Williams, that he maintained his innocence for some period of time, and that he claimed that the circumstances of the interrogation caused him to admit the shooting").

104. *Cf.* Dempsey v. State, 277 Md. 134, 355 A.2d 455 (1976) (holding that defendant's intoxication at the time of his confession was relevant to determining the voluntariness of his confession).

105. *Baynor*, 355 Md. at 737, 736 A.2d at 331.

106. *Id.*

107. *See id.* at 740, 736 A.2d at 332.

statement regarding the death penalty had motivated Baynor to abandon his assertions of innocence and confess.[108] Recordings preserve intangible factors, such as tone of voice, from which the jury may draw conclusions about the credibility of the speaking parties.[109] In effect, a recording could serve as a check on law enforcement officers, allowing the jury to consider factors such as the words spoken, their tone, and their context, without considering, as may occur at trial, that one of the parties to the conversation is currently incarcerated and the other is a law enforcement officer.[110]

Despite the obvious benefits of verbatim recordings, the court correctly concluded that they are not a necessary component for compliance with Rule 4-263 because, in *Baynor*, there were alternative ways to establish evidence favorable to the defense at trial.[111] Evidence of statements made by detectives and their effects on Baynor could have been established through Baynor's testimony and, to a lesser extent, through the testimony of Detectives Glenn and Jones.[112] In fact, at the suppression hearing, Detective Glenn, not Baynor, testified as to the statement regarding the possibility of a summary death sentence.[113] Thus, Baynor was not denied the opportunity to produce that fact, because he could have elicited it through cross-examination.

Sweeping changes in required law enforcement practices should not be made without notice to law enforcement personnel. The Alaska and Minnesota courts, which mandate that interrogations be

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108. *See id.* at 737, 736 A.2d at 331. Baynor argued that without a verbatim recording of his interrogation, the jury would not be able to consider the totality of the circumstances surrounding his confession. *Id.*; *see also* Wrestling & Waye, *supra* note 61, at 508 n.98 (observing that a reliable record furthers the establishment of basic historical facts from which the trier of fact may make a voluntariness determination).

109. *Cf.* Wrestling & Waye, *supra* note 61, at 537 (asserting that "[v]ideo recording creates a firm record of events taking place in the police station which would render the judge's gatekeeping role more accurate and more reliable").

110. *See* Reck v. Pate, 367 U.S. 433, 446 (1961) (Douglas, J., concurring) (noting, in the context of the voluntariness inquiry, that "[t]here is the word of the accused against the police. But his voice has little persuasion . . . ."); *see also* Wrestling & Waye, *supra* note 61, at 504 (noting that "[t]he invisibility at the interrogation process combined with attempts to recreate those events through memory and testimony tend to produce 'swearing contests' between the police interrogators and the suspects. Police generally win these traditional swearing contests.").

111. *Baynor*, 355 Md. at 748-49, 736 A.2d at 337 (noting that Baynor could have testified to his recollection of the interrogation and his attorney could have obtained a transcript of Detective Glenn's testimony at the suppression hearing and used it to impeach the detective).

112. *Id.*

113. *Id.* Baynor first raised the issue that he was told he could "summarily" be put to death only after Detective Glenn testified at the suppression hearing. *Id.* at 749 n.5, 736 A.2d at 337 n.5.

recorded, warned law enforcement personnel in published opinions prior to issuing a mandate.[114] Thus, the decisions in *Stephan* and *Scales* were a reaction to the lack of compliance by law enforcement officials with earlier decisions that urged recorded interrogations.[115] In their decisions to mandate recordings, the Alaska and Minnesota courts considered the failure of law enforcement to comply with the courts' prior holdings.[116] Because the Court of Appeals of Maryland had not previously urged the use of recordings, mandating such recordings without allowing law enforcement the opportunity to obtain technology and to fashion a system for implementing its use would not be a logical next step, as it was in Alaska and Minnesota.

b. Limiting Cross-Examination Curtails the Jury's Decisionmaking Ability.—In *Baynor*, the jury was also denied an opportunity to hear important evidence because the trial court limited the defense's cross-examination of a State's witness. The Court of Appeals was incorrect in its decision that the trial judge did not err in limiting the defense's cross-examination. The Court of Appeals's reasoning is inconsistent on this issue. First, the court held that the State was not required to disclose the entire circumstances of the defendant's interrogation because there were alternative ways to establish those circumstances.[117] One of those alternative sources was cross-examination of the State's witnesses.[118] The court, however, weakened its own reasoning by upholding the discretion of the trial judge in limiting the defendant's cross-examination, thus preventing the defendant from establishing the circumstances of his interrogation.

The role of the jury as the trier of fact is to listen to all of the evidence presented, assess the credibility of that evidence, and make a determination based on that assessment.[119] At Baynor's trial, the jury was not able to consider the totality of the circumstances surrounding the defendant's confession, nor were they able to assess the credibility of the evidence regarding a summary death sentence because of the trial judge's interference with cross-examination.[120] By rejecting the defendant's argument that the jury should have been allowed to hear the exact language used by the detective, the court assumed that, if

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114. Stephan v. State, 711 P.2d 1156, 1157-58 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 591 (Minn. 1994).

115. *See Stephan*, 711 P.2d at 1157-58; *Scales*, 518 N.W.2d at 591.

116. *See Stephan*, 711 P.2d at 1157-58; *Scales*, 518 N.W.2d at 591.

117. *See Baynor*, 355 Md. at 748-49, 736 A.2d at 337.

118. *Id.* at 749, 736 A.2d at 337.

119. *See* Dykes v. State, 319 Md. 206, 224, 571 A.2d 1251, 1260 (1990).

120. *See Baynor*, 355 Md. at 749-51, 736 A.2d at 337-38 (Raker, J., dissenting).

presented with this information, the jury would likely conclude, as did the trial judge, that the evidence was not worthy of belief.[121] However, the trial court's conclusion and the Court of Appeals's affirmation of that conclusion are problematic in light of the jury's traditional role as the finder of fact.[122] Questions of credibility are factual questions which are "peculiarly the province of a jury and not subject to . . . review."[123] The jury could have determined that the defendant's confession was voluntary, even in light of the fact that Baynor was told that he could "summarily" receive the death penalty.[124] However, the jury was not afforded the opportunity to reach its own conclusion because the trial judge prevented it from hearing evidence regarding the detective's statement.[125]

The Court of Appeals held that "the method, scope and extent of cross-examination are within the trial court's discretion, and in the absence of an abuse of discretion will not be interfered with on appeal."[126] "Whether there has been an abuse of discretion necessarily requires consideration of the particular circumstances of each individual case; if the limitations placed upon cross-examination inhibit the ability of the defendant to receive a fair trial, the general rule vesting the court with discretion to disallow the inquiry does not apply."[127] The judge's discretion to control cross-examination is also tempered by the fact that "[j]urors [are] entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [the witnesses'] testimony."[128]

One questionable aspect of the *Baynor* court's decision is its finding that "the court and the jury were able to consider all of the existing evidence, written and testimonial, regarding the circumstances" surrounding the acquisition of Baynor's confession, yet, the jury was

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121. *Id.* at 741, 736 A.2d 333 (noting that Baynor testified at the suppression hearing that he was induced to confess in order to avoid the death penalty and that "the trial court did not believe this evidence").

122. *See Dykes*, 319 Md. at 224, 571 A.2d at 1260 ("When the trial judge resolves conflicts in the evidence, . . . and refuses to instruct because he believes that the evidence supporting the request is incredible . . . he improperly assumes the jury's role as fact-finder.").

123. Peroti v. Williams, 258 Md. 663, 670, 267 A.2d 114, 118 (1970) (holding that the jury could find damages unwarranted if it found the plaintiff not credible). Credibility determinations made by the jury will not be subject to challenge on appeal because the jury, unlike the appellate court, has the opportunity to observe the demeanor and tone of the witness's voice. *Id.*

124. *See Baynor*, 355 Md. at 740, 736 A.2d at 332.

125. *See id.* at 742, 736 A.2d at 333-34.

126. Corens v. State, 185 Md. 561, 566, 45 A.2d 340, 344 (1946).

127. Ebb v. State, 341 Md. 578, 587-88, 671 A.2d 974, 978 (1996) (citations omitted).

128. *Id.* at 599, 671 A.2d 984 (Bell, J., dissenting) (quoting Douglas v. Alabama, 380 U.S. 415, 419 (1965)).

prevented from hearing testimony regarding Detective Glenn's statement that Baynor could face a summary death sentence. [129] In this way, the Court of Appeals gave the trial judge discretion to limit the defendant's ability to develop his theory of the case. The ability to elicit testimony regarding Detective Glenn's exact statement was critical to the defendant's theory that his confession was made involuntarily as a result of this threat.

The *Baynor* court found no abuse of discretion where the judge repeatedly sustained "asked and answered" objections to questions regarding statements made by Detective Glenn to Baynor.[130] In fact, those questions never were answered, and Baynor was prevented from eliciting testimony that could have changed the outcome of his case.[131] While "[i]t is well established that '[t]he allowance or disallowance of certain questions on cross-examination normally is left to the sound discretion of the trial judge,'"[132] the Court of Appeals should not have found that the trial judge's obstruction of cross-examination was within the realm of his discretion. The trial court was effectively permitted to bar the defendant from exploring a line of questioning upon which the vitality of the defense theory depended.

Moreover, the substance of the questions and answers were clearly relevant to the jury reaching an informed decision.[133] If the jury had heard evidence regarding Detective Glenn's statement that Baynor could "summarily" receive the death penalty, the jury might have reasonably concluded that the confession was not made voluntarily.[134] A conclusion that Baynor's confession was made involuntarily may have greatly impacted the jury's determination of guilt. In this light, the court's conclusion in *Baynor* is problematic because the very premise on which it rests is flawed, as illustrated by the portions of the trial record in which the trial judge sustained objections as "asked and

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129. *See Baynor*, 355 Md. at 741, 736 A.2d at 333.

130. *Id.* at 747-48, 736 A.2d at 336. The court, in its discretion, can sustain objections to questions as asked and answered to prevent the repetition of questions and to avoid unnecessary delay. *See* Marshall v. State, 346 Md. 186, 193, 695 A.2d 184, 188 (1997) ("The trial judge retains discretion to impose reasonable limits on cross-examination . . . to prevent harassment, prejudice, confusion of the issues, or inquiry that is repetitive or marginally relevant.").

131. *See Baynor*, 355 Md. at 747-48, 736 A.2d at 336; *id.* at 751, 736 A.2d at 338 (Raker, J., dissenting) (noting the ultimate lack of response to the question).

132. *See* Vitek v. State, 295 Md. 35, 40, 453 A.2d 514, 516 (1982) (quoting Beasley v. State, 271 Md. 521, 527, 318 A.2d 501, 504 (1974)).

133. *See* Clark v. State, 364 Md. 611, 661, 774 A.2d 1136, 1166 (2001) (quoting Davis v. Alaska, 415 U.S. 308, 317 (1974)) (holding that "jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to what weight to place on [evidence] which provided a critical link in proof").

134. *See Baynor*, 355 Md. at 751, 736 A.2d at 338 (Raker, J., dissenting).

answered," when in fact, the jury was never allowed to hear the answers.[135] The court based its decision that the trial judge did not err in large part on its criticism of the questioning tactics used by Baynor's counsel.[136] In this way, the court sent a message to criminal defense attorneys that it will not entertain claims of judicial error in limiting the examination of witnesses unless counsel uses all techniques at his disposal in attempting to circumvent the trial judge's restrictions.

c. Constitutional Concerns.—A final problematic aspect of the *Baynor* case is that the court's holding is contrary to the purpose of the privilege against self-incrimination, which is to prevent a defendant from experiencing any ramifications as a result of his decision not to testify.[137] The court's language suggests that a defendant who chooses not to testify at trial waives the right to challenge evidence that he could have contradicted had he chosen to take the stand.[138] Thus, the court faulted Baynor for exercising his privilege against self-incrimination when his testimony alone could have clarified for the jury the circumstnces surrounding his confession.[139] As a result, the court has weakened the rights of criminal defendants against self-incrimination as guaranteed by the Maryland Declaration of Rights, and the Fifth Amendment to the United States Constitution.

5. Conclusion.—The *Baynor* court erected additional barriers for criminal defendants in an already difficult process of challenging a recorded confession. The court categorically rejected the need for verbatim recordings of interrogations, and, in doing so, limited the defendant's ability to establish the entire circumstances surrounding his confession. *Baynor* forces defendants and their attorneys to carefully consider which trial strategies to employ by holding that a defendant's choice not to testify may equate to a waiver of the right to

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135. *See Baynor*, 355 Md. at 747-48, 736 A.2d at 336.

136. *Id.* at 749, 736 A.2d at 337 (noting that "had Baynor considered the matter [of advice that he could summarily be put to death] important, he could have obtained for use at trial a transcript of that portion of Glenn's testimony at the suppression hearing").

137. The Fifth Amendment states, in relevant part, "No person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

The Fifth Amendment is applicable to the states through the Due Process clause of the Fourteenth Amendment. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964); *see also, e.g.*, MARYLAND PATTERN JURY INSTRUCTIONS-CRIMINAL § 3:17, at 62 ("The defendant has an absolute constitutional right not to testify. The fact that the defendant did not testify must not be held against the defendant. It must not be considered by [the jury] in any way or even discussed . . . .").

138. *See Baynor*, 355 Md. at 748, 736 A.2d at 337.

139. *See id.*

challenge evidence that the defendant's testimony could rebut. Additionally, the court reaffirmed the wide discretion of a trial judge to control the scope of cross-examination. In doing so, the court creates a dilemma for defendants who choose not to testify based on an intention to establish factual elements of their defense through cross-examination of State's witnesses. The criminal defendant in Maryland must now consider the possibility that the trial judge, in his or her discretion, may limit his ability to present his theory to the jury by restricting cross-examination. The court's ruling in *Baynor* is a warning to defendants and defense attorneys that confessions will not be found involuntary absent early challenges and tactful trial planning.

CHRISTINE M. SIEMEK

VII. EMPLOYMENT LAW

A. *Workers' Compensation Act Does Not Entitle an Employer to Restitution When an Employee Has Been Unjustly Enriched by an Overpayment of Benefits*

In *Sealy Furniture of Maryland v. Miller*,[1] the Court of Appeals considered whether the Workers' Compensation Commission (the Commission) was authorized to order a credit against an employee's permanent partial disability benefits in order to reimburse the employer for his erroneous overpayment of the employee's temporary total disability benefits.[2] The court unanimously denied the appellant's claim for a remedy under an unjust enrichment theory, reasoning that ordering a credit against a separate award would be inconsistent with legislative intent.[3] The *Sealy* court's decision is consistent with prior Maryland case law, which holds that the Workers' Compensation Act's silence with respect to reimbursement of an employer's overpayment indicates the legislature's intent to preclude recovery to the employer.[4] In so holding, however, the *Sealy* court summarily dismissed equitable arguments on behalf of the employer that courts in other jurisdictions have recognized,[5] and that other state legislatures have incorporated into their statutory schemes.[6] While the outcome in *Sealy* may be fair from a public policy perspective, the court should have seized this opportunity to urge the Maryland Legislature to revisit the issue of a claimant's unjust enrichment, and following the example set by other jurisdictions, explicitly include a provision for restitution as a remedy for an employer. [7]

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1. 356 Md. 462, 740 A.2d 594 (1999).

2. *Id.* at 463-64, 740 A.2d at 595.

3. *See id.* at 469-70, 740 A.2d at 598 (restating "the basic legislative design—that an injured worker . . . is entitled to receive seriatim the benefits for each of the separate disabilities as were caused by the nature and extent of his injury." (internal quotation marks omitted) (quoting Mayor of Balt. v. Oros, 301 Md. 460, 470, 483 A.2d 748, 753 (1984))).

4. *See infra* notes 43-76 and accompanying text (discussing Maryland cases which have denied reimbursement to an employer who paid an employee while an appeal was pending, as well as cases denying reimbursement of an overpayment by way of a credit against the future payment of a separate award).

5. *See infra* notes 77-94 and accompanying text (citing cases in other jurisdictions that allow an employer to recover benefit overpayments made to employees).

6. *See infra* note 116 (citing workers' compensation statutes in other jurisdictions which provide for reimbursement of the overpayment or a credit against the future payment of a benefit award).

7. *See infra* note 116 and accompanying text (discussing the equitable remedies provided in other jurisdictions' statutory schemes).

1. The Case.—In April 1989, Brenda Miller, an employee of Sealy Furniture of Maryland, filed a workers' compensation claim, alleging that she injured her right hand during the course of her employment as a result of pulling fabric.[8] One month later, the Commission entered an order directing Sealy Furniture to pay temporary total disability benefits beginning January 12, 1989.[9] In June 1990, the parties agreed that due to her "occupational disease" of carpal tunnel syndrome,[10] Miller could not resume her normal employment, and, therefore, the parties developed an alternative vocational rehabilitation plan.[11] On July 10, 1990, the Commission approved the plan and entered an order directing Sealy to continue payment of the temporary total disability benefits in the amount of $273 per week for the duration of the rehabilitation period.[12]

On August 11, 1994, the Commission notified both parties that the vocational rehabilitation service terminated, and, on August 25, 1994, Sealy evaluated Miller and found that she had reached maximum medical improvement.[13] Notwithstanding this conclusion, Sealy continued to pay temporary total disability benefits to Miller in the amount of $261 per week until February 1, 1995.[14] Sealy sent Miller a document entitled "Termination of Temporary Total Disability," which notified Miller that she had reached maximum medical improvement as of August 25, 1994, and that the temporary total disability payments would stop on February 1, 1995.[15]

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8. *Sealy*, 356 Md. at 464, 740 A.2d at 595. Miller's injury was diagnosed as carpal tunnel syndrome. Appellee's Brief at 3, *Sealy* (No. 36).

9. *Sealy*, 356 Md. at 464, 740 A.2d at 595. January 12, 1989 was the date of Miller's disablement. *Id.*

10. *Id.* at 463 n.1, 740 A.2d at 595 n.1.

11. *Id.* at 464, 740 A.2d at 595. The Act provides that an employer must pay the costs of a vocational rehabilitation plan if the worker cannot return to his same line of work, and if, after an evaluation of the employee by a vocational counselor, the Commission approves the plan. MD. CODE ANN., LAB. & EMPL. § 9-673 (1999). The purpose of vocational rehabilitation service is to ensure that the employee will be able to return to the work force in a position similar to that which he held before the injury. RICHARD P. GILBERT & ROBERT L. HUMPHREYS, JR., MARYLAND WORKERS' COMPENSATION HANDBOOK §§ 9.0-4.1, at 189-90 (2d ed. 1988).

12. *Sealy*, 356 Md. at 464, 740 A.2d at 595. MD. CODE ANN., LAB. & EMPL. § 9-674(b)(1) provides: "While a covered employee is receiving vocational rehabilitation services, the employer or its insurer shall pay compensation to the covered employee as if the covered employee was temporarily totally disabled." *Id.*

13. *Sealy*, 356 Md. at 465, 740 A.2d at 596.

14. *Id.* The record does not explain the discrepancy between the $261 per week that was paid and the $273 per week that was ordered by the Commission. *Id.* at 465 n.3, 740 A.2d at 596 n.3.

15. *Id.* at 465, 740 A.2d at 596. In the proceedings, Sealy claimed that payments totaling $5872.50 ($261 per week for the 22.5 weeks from August 25, 1994 to February 1, 1995) constituted an overpayment which it was entitled to recover. *Id.*

After the payment of vocational rehabilitation benefits terminated, Miller filed a claim with the Commission for a permanent partial disability benefit award.[16] In June 1996, the Commission held a hearing on the nature and extent of Miller's permanent partial disability.[17] The Commission found that Miller had suffered a permanent, partial disability of a fifteen percent loss of use to her right hand.[18] The Commission ordered that a permanent partial disability award be paid to Miller at the rate of $82.50 per week for 37.5 weeks, totaling $3,093.[19] In response to this finding and at the same hearing, Sealy requested a credit for the temporary total disability overpayments distributed between August 25, 1994 and February 1, 1995.[20] In the same order awarding a permanent partial disability benefit, the Commission granted Sealy's requested credit.[21] Because the amount of the credit exceeded the amount of the new award, the effect of the credit was to excuse Sealy from any further benefit payments to Miller.[22]

Miller sought judicial review of this order in the Circuit Court for Wicomico County.[23] She filed a motion for summary judgment, arguing that the Commission could not deduct overpayment of vocational rehabilitation benefits from permanent partial disability payments owed to the same individual.[24] In response, Sealy filed a cross motion for summary judgment, asserting that it was entitled to a credit against the future payment of Miller's benefits.[25] After a hearing on whether the Commission acted correctly in allowing the credit, the trial court granted Sealy's motion.[26]

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* The order of compensation stated that the permanent partial disability award was "subject to a credit for overpayment of temporary total disability benefits from August 26, 1994 through February 1, 1995." Appellant's Brief at E20, *Sealy* (No. 36).

22. *Sealy*, 356 Md. at 465, 740 A.2d at 596.

23. *Id.*

24. Appellee's Brief at 5, *Sealy* (No. 36).

25. Appellant's Brief at E33-34, *Sealy* (No. 36).

26. *Sealy*, 356 Md. at 465, 740 A.2d at 596. A trial was then held on the remaining issue of the degree of Miller's permanent partial disability. *Id.* The jury increased the disability to her right arm from 15% to 25%, adding $2062 to her award. *Id.* She still did not receive the benefit of these payments because of the credit previously granted. *Id.* at 466, 740 A.2d at 596. The amount of the credit was greater than the adjusted total benefits award by $716. *Id.*

Following this judgment, Miller appealed to the Court of Special Appeals.[27] The Court of Special Appeals reversed the trial court, holding that the Commission did not have the authority to deduct an overpayment of one kind of award from the benefits payable under a separate award.[28] The Court of Appeals granted Sealy's petition for certiorari to decide whether the Commission has the authority to set off an overpayment of one type of disability award against benefits payable under a separate award to the same employee for the same injury.[29]

2. Legal Background.—The Maryland Workers' Compensation Act (the Act) was enacted in 1914 with the purpose of compensating employees for lost income as a result of an accidental injury, death, or disease occurring during the course of employment.[30] The Act was designed to guarantee an employee an exclusive remedy, regardless of fault, for an injury that occurred as a result of his or her employment.[31] Workers' Compensation law is largely a statutory creature, and Maryland courts, in an effort to interpret the law in this area, strictly construe the statute according to its plain meaning and clear legislative intent.[32]

With respect to the reimbursement of an overpayment, Maryland courts began by strictly construing legislative intent to deny reimbursement pending appeal and eventually broadened the rule to deny

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27. *Id.*; *see* Miller v. Sealy, 125 Md. App. 178, 724 A.2d 743 (1999).

28. *Miller*, 125 Md. App. at 182-83, 724 A.2d at 745.

29. *Sealy*, 356 Md. at 466, 740 A.2d at 596.

30. MD. CODE ANN., LAB. & EMPL. §§ 9-101 to -1201 (1999); *see* Philip Elecs. N. Am. v. Wright, 348 Md. 209, 215-16, 703 A.2d 150, 153 (1997) (describing the history of the Act); DeBusk v. Johns Hopkins Hosp., 342 Md. 432, 437, 677 A.2d 73, 75 (1996) (stating that the Act "was designed to provide employees with compensation for loss of earning capacity, regardless of fault, resulting from accidental injury, disease, or death occurring in the course of employment").

31. MD. CODE ANN., LAB. & EMPL. § 9-509(a) ("Except as otherwise provided in this title, the liability of an employer under this title is exclusive.").

32. *See Wright*, 348 Md. at 225-26, 703 A.2d at 158 (finding that, absent clear statutory language to the contrary, the General Assembly intended that an employer's credit for an amount paid pending judicial review be based on the number of weeks paid instead of the total amount of benefits paid); Marriott Employees Fed. Credit Union v. Motor Vehicle Admin., 346 Md. 437, 444, 697 A.2d 455, 458 (1997) (noting that "[t]he cardinal rule of statutory construction is to ascertain and carry out the intention of the Legislature"); Bowen v. Smith, 342 Md. 449, 454-55, 677 A.2d 81, 84 (1996) (indicating that the court must look to the language of the workers' compensation statute to determine whether the legislature intended to permit employers to terminate an employee's temporary total disability benefits based on the employee's incarceration).

a credit for overpayment of one award against another award.[33] Courts in other jurisdictions, however, have not construed workers' compensation statutes so strictly and have allowed common-law remedies to be applied in conjunction with their statutory schemes.[34]

a. The Maryland Workers' Compensation Act.—Workers' compensation disability benefits are designed to provide compensation for loss of wages or earning capacity as a result of an accidental injury or occupational disease.[35] The Act recognizes four separate categories of disabilities: temporary partial disability, temporary total disability, permanent partial disability, and permanent total disability.[36] The categories are distinguished by the severity and duration of the injury.[37]

The purpose of a temporary total disability award is to provide compensation for the recuperation period during which time the employee is wholly disabled and unable to work.[38] This award terminates when an employee realizes his maximum level of improvement or when his disability is determined to be permanent.[39] The Act provides that temporary total disability benefits shall be paid during any period of vocational rehabilitation.[40] A worker may receive an award for temporary total benefits, as well as compensation for permanent total disability or permanent partial disability.[41] The Act does not allow compensation for these awards to be given concurrently, because each are payable for a distinct type of disability.[42]

b. No Reimbursement Pending Appeal.—The principal early cases denying reimbursement to employers highlight the development of legislative intent-based reasoning. In *Hoffman v. Liberty Mu-*

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33. *See infra* notes 43-61 and accompanying text (discussing Maryland courts' strict interpretation of legislative intent in denying reimbursement pending appeal); *infra* notes 61-76 and accompanying text (discussing how the rule broadened to deny credits for overpayment of an award).

34. *See infra* notes 77-94 and accompanying text (discussing courts in other jurisdictions that have applied restitution despite the statutes' silence regarding this remedy).

35. GILBERT & HUMPHREYS, *supra* note 11, § 9.0-2, at 187.

36. *See* MD. CODE ANN., LAB. & EMPL. § 9-615 (providing the guidelines for payment of temporary partial disability compensation); *id.* § 9-621 (providing the guidelines for payment of temporary total disability compensation); *id.* §§ 9-626 to -627 (providing the guidelines for the amount and duration of permanent partial disability compensation); *id.* § 9-635 (providing payment guidelines for permanent total disability compensation).

37. GILBERT & HUMPHREYS, *supra* note 11, § 9.0-2, at 187.

38. *Id.* § 9.3, at 204.

39. *Id.* at 205.

40. *Id.* at 205-06.

41. *Id.* at 206.

42. *Id.*

tual Insurance Co.,[43] the Court of Appeals of Maryland provided a tangential discussion of whether an employer is entitled to reimbursement of an overpayment of benefits to an employee.[44] In *Hoffman*, the insurer tried to overturn a lien on the claimant's attorney fee by applying funds in escrow to reimburse itself for an overpayment it made to the claimant during a pending appeal.[45] The court held that the lien could not be defeated, explaining that it is established law that an employer is obligated to make benefit payments throughout the period of a pending appeal.[46] In dicta, the court noted that the employee did not owe funds to the insurer, because reimbursement for funds overpaid while an appeal is pending is impermissible.[47]

The Court of Appeals directly confronted the issue of reimbursement for disability overpayment in *St. Paul Fire & Marine Insurance Co. v. Treadwell*.[48] In *Treadwell*, the Commission erroneously granted a workers' compensation award, and, pending appeal of that award, the insurer made the necessary payments to the employee.[49] After the order was rescinded, the insurance company filed an action to recover the overpayments.[50] While the court acknowledged that there was no specific language in the Act either allowing or forbidding recovery of these payments, the court reasoned that, when enacting the "no stay" provision,[51] the legislature likely envisioned the possibility that, during a pending appeal, payments would be made to employees whose awards would later be rescinded.[52] The court concluded that the absence of a remedy provision in the Act indicated that the legislature had rejected the notion of restitution.[53]

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43. 232 Md. 51, 191 A.2d 575 (1963).

44. *See id.* at 56, 191 A.2d at 578 (stating that "[c]ontrary to appellee's contention, no money was owed by the claimant to appellee, since an overpayment does not permit recovery by the insurer in this situation" (citing Branch v. Indem. Ins. Co. of N. Am., 156 Md. 482, 144 A. 696 (1929))).

45. *Id.* at 54-55, 191 A.2d at 577.

46. *Id.* at 56, 191 A.2d at 578 (citing *Branch*, 156 Md. at 489, 144 A. at 698 (noting that the policy behind enacting a no-stay provision for appeals was to ensure the employee speedy relief)).

47. *Id.*

48. 263 Md. 430, 430-31, 283 A.2d 601, 601-02 (1971).

49. *Id.*

50. *Id.*

51. MD. CODE ANN., LAB. & EMPL. § 9-726 (c) (1999) provides: "A motion for rehearing does not stay: (1) the decision of the Commission; or (2) the right of another party to appeal from the decision."

52. *Treadwell*, 263 Md. at 437, 283 A.2d at 605.

53. *Id.* at 437-38, 283 A.2d at 605.

Recently, in *Philip Electronics North America v. Wright*,[54] the court addressed whether an overpayment made during a pending appeal could be recovered by crediting the employer's continuing obligation to pay an award.[55] In *Wright*, the employee was originally awarded a permanent partial disability award of $178 per week for 333 weeks.[56] An appeal resulted in the reduction of her compensation award to $144 per week for 200 weeks, as well as an order by the Commission to credit the employer's overpayment against the total sum of the future payment of the revised award.[57] Philip Electronics argued that the Court of Special Appeals was incorrect when it held that the company was entitled only to a credit for the number of weeks of benefits paid rather than a credit for the total sum overpaid.[58] The court rejected that argument, reasoning that the legislature constructed the Act in terms of weekly payments and concluding that a credit is only allowed in this weekly framework.[59] The court thus held that "when a claimant's initial award by the Commission is reduced pursuant to a petition for judicial review, an employer shall be entitled to a credit for the *number of weeks* of benefits actually paid in accordance with the original order, rather than a credit based upon the *amount of money* previously paid to the worker."[60] Therefore, although an employer may be granted a credit for the number of weeks of benefit payments, the court has consistently held that a credit for the total amount of overpaid funds is not permitted when those overpayments are made as a result of a pending appeal.[61]

c. No Credit Against Separate Award.—A separate line of cases has evolved in Maryland, which denies an employer a credit for the overpayment of one award against the future payment of a separate award.[62] In this line of cases, Maryland courts examined the legisla-

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54. 348 Md. 209, 703 A.2d 150 (1997).

55. *Id.* at 217-18, 701 A.2d at 154.

56. *Id.* at 213, 701 A.2d at 152.

57. *Id.* After the original award by the Commission, both parties filed petitions for judicial review in circuit court. *Id.* After a hearing in circuit court, a jury found that the claimant had suffered a forty percent loss of the use of her body as a result of her injury. *Id.* Upon remand, the Commission recalculated the claimant's compensation award, and it was reduced. *Id.*

58. *Id.* at 214, 703 A.2d at 152.

59. *Id.* at 218, 703 A.2d at 154.

60. *Id.* at 225-26, 703 A.2d at 158 (emphasis added).

61. *See id.*

62. *See, e.g.*, Mayor of Balt. v. Oros, 301 Md. 460, 470, 483 A.2d 748, 753 (1984) (holding that the Act does not allow the reduction of one benefit to compensate an employer for the overpayment of a separate benefit); Gorman v. Atl. Gulf & Pac. Co., 178 Md. 71, 77-78, 12 A.2d 525, 529 (1940) (recognizing that the Act provides for distinct types of benefits,

ture's intent in creating the separate categories of employee compensation and concluded that the law does not permit a credit for the overpayment of one kind of award against another award.[63] In *Gorman v. Atlantic Gulf & Pacific Co.*,[64] the court considered whether a $5000 limit on compensation for a temporary total disability award was also the limit of total compensation to be paid to an injured employee who simultaneously received a permanent partial disability award.[65] The court noted that the legislature had intended to create four separate categories from which an employee could be compensated.[66] These included temporary total disability, permanent total disability, temporary partial disability, and permanent partial disability.[67] Because each is considered a separate benefit and serves a different purpose, there can be "distinct, consecutive, and cumulative awards of compensation for the periods of temporary total disability and of permanent partial disability under the Maryland Act."[68]

In *Mayor of Baltimore v. Oros*,[69] the court, relying upon *Gorman*'s premise that the compensation awards are separate and distinct, held that an excess payment of one award could not be credited against the future payment of a separate award.[70] In *Oros*, three employees received awards of temporary total disability benefits during the same period that the City also paid each employee his full salary.[71] Subsequently, when the employees reached maximum medical improvement, they sought and were awarded permanent partial disability benefits.[72] In two of the three cases, the Commission also credited the amount of the excess salary paid, over and above the amount of tem-

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each serving a separate purpose, and that one type of compensation should not be made in lieu of other types of compensation).

63. *See Oros*, 301 Md. at 468-70, 483 A.2d at 751-53 (reviewing Maryland precedent that described the purpose behind having separate categories of compensation and concluding that the legislature did not intend to allow an employer to "provide an excess benefit for but one of the disabilities provided . . . and then to suggest it has provided a largess that would lessen or eliminate its liability for the other benefits it is bound by the Act to furnish").

64. 178 Md. 71, 12 A.2d 525 (1940).

65. *Id.* at 73, 12 A.2d at 527.

66. *Id.* at 75, 12 A.2d at 527.

67. *Id.*

68. *Id.* at 78, 12 A.2d at 529 (noting additionally that the period of temporary total disability is the healing time during which the injured employee is completely unable to work, and this purpose is distinct from a period of permanent partial disability).

69. 301 Md. 460, 483 A.2d 748 (1984).

70. *Id.* at 466-67, 483 A.2d at 751 (discussing Judge Parke's opinion in *Gorman* which considered the legislature's intent that an injured employee receive a separate benefit award for each type of disability).

71. *Id.* at 462, 483 A.2d at 749.

72. *Id.*

porary total benefits ordered, to be paid against the future payment of permanent partial benefits.[73]

The Court of Appeals held that the Commission erred in applying such a credit, and affirmed the rule established in *Gorman*.[74] The court explained that a "workman, who has sustained a temporary total disability and a permanent partial disability of a specific kind or nature, receives a separate award for each such disability."[75] Thus, the court found that the Act does not allow a reduction or elimination of distinct benefits merely because the employer has overpaid the beneficiary for some other benefit.[76] The court's holdings and reasoning in the line of cases beginning with *Gorman* and continuing through *Oros* yield the Maryland rule that the legislature intended compensation benefits to be separate and distinct awards and therefore did not intend for a credit for the overpayment of one award to be used against the future payment of another separate award.

d. Case Law in Other Jurisdictions Recognizing a Common-Law Remedy.—Courts in jurisdictions outside of Maryland have recognized an employer's common-law remedy of restitution and have allowed recovery of overpaid benefits. In *Hajnas v. Engelhard*[77] and *Glen Alden Corp. v. Tomchick*,[78] widow beneficiaries remarried and did not notify their former spouses' respective employers of this fact.[79] According to the applicable workers' compensation acts, upon remarriage, a surviving spouse is no longer entitled to receive death benefits.[80] As a consequence of the widows' deception and fraud, their respective employers continued to make benefit payments.[81] In *Hajnas*, the court determined whether and how an employer can seek restitution for overpayments amounting to unjust enrichment.[82] When presented with the argument that the overpayments simply were not

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73. *Id.* at 463-64, 483 A.2d at 749-50.
74. *Id.* at 470, 483 A.2d at 753.
75. *Id.* at 467-68, 483 A.2d at 751-52 (quoting *Gorman*, 178 Md. at 76, 12 A.2d at 525).
76. *Id.* at 470, 483 A.2d at 753.
77. 555 A.2d 716 (N.J. 1989).
78. 130 A.2d 719 (Pa. Super. Ct. 1957).
79. *Hajnas*, 555 A.2d at 717; *Glen Alden*, 130 A.2d at 720.
80. *See* N.J. STAT. ANN. § 34:15-13(f) (West 1999). The statute provides:
> Should the surviving spouse of a deceased employee remarry during such period and before the total compensation is paid, the spouse shall be entitled to receive the remainder of the compensation which would have been due the spouse had the spouse not remarried, or 100 times the amount of weekly compensation paid immediately preceding the remarriage, whichever is the lesser.

Id.
81. *Hajnas*, 555 A.2d at 717; *Glen Alden*, 130 A.2d at 720.
82. *Hajnas*, 555 A.2d at 720-22.

recoverable because the statute did not provide for a remedy, the New Jersey Supreme Court concluded that "basic fairness dictates that [the employer] at least should be afforded a forum in which to litigate its entitlement to recovery of such overpayments on the basis of alleged unjust enrichment" and held that the Workers' Compensation Division had jurisdiction to hear a claim for restitution.[83]

Similarly, the Pennsylvania Superior Court, in *Glen Alden*, concluded that the overpaying employer did not have a remedy for unjust enrichment within the statutory framework of the Workmen's Compensation Act; although the court noted that "[i]t does not follow, however, that [the plaintiff] is without recourse for we have presented to us an obvious case of unjust enrichment now well established in our law, and over which this court has jurisdiction."[84]

In *Lucey v. Workmen's Compensation Appeal Board*,[85] a totally disabled employee was awarded compensation for his medical expenses and was paid a majority of the amount due by his employer.[86] The employer, however, was unaware that the employee had reached an agreement with his medical provider to pay a lesser amount for his medical services and therefore inadvertently overpaid the employee.[87] The Pennsylvania Supreme Court relied on a provision in the *Restatement of the Law of Restitution*, stating that when a person has overpaid another to whom they owe a duty as a result of a mistake of fact, the person is entitled to restitution in the amount of the excess payment.[88] To offset the benefit received by the employee, the *Lucey* court awarded the employer a credit in the appropriate amount to future payments of benefits.[89]

In *Reil v. State Compensation Mutual Insurance Fund*,[90] the Montana Supreme Court considered whether the state was entitled to reim-

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83. *Id.* at 719.

84. *Glen Alden*, 130 A.2d at 721 (internal quotation marks omitted) (quoting the trial court).

85. 732 A.2d 1201 (Pa. 1999).

86. *Id.* at 1202-03. The claimant received $140,000 out of the $175,546.32 due by the employer. *Id.*

87. *Id.* at 1204.

88. *Id.* (citing RESTATEMENT OF THE LAW OF RESTITUTION § 20 (1937)). The *Restatement* provides:

> A person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty, for the performance of a condition, or for the acceptance of an offer, is entitled to restitution of the excess.

Id.

89. *Lucey*, 732 A.2d at 1204.

90. 837 P.2d 1334 (Mont. 1992).

bursement of all compensation paid pursuant to an order of the Workers' Compensation Court after the order was later vacated on appeal.[91] The employee argued that the state could not recoup the benefits already paid because the workers' compensation statute did not provide for a restitution remedy.[92] In response, the court reasoned that "a party has the right to recover assets lost by enforcement of a judgment subsequently reversed on appeal."[93] The court held that the common-law principle of restitution applied to workers' compensation cases, despite the fact that they were also governed by a statute that provided no explicit remedy.[94]

3. The Court's Reasoning.—In *Sealy Furniture v. Miller of Maryland*, the court unanimously affirmed the judgment of the Court of Special Appeals, holding that, absent a finding by the Commission that Miller knowingly accepted benefits to which she was not entitled,[95] the Commission did not have any authority to correct the overpayment of an award by ordering a credit against another separate award.[96] Writing for the court, Judge Wilner recognized the possibility that situations involving an overpayment of benefits may amount to the unjust enrichment of a claimant.[97] Nonetheless, the court concluded that the legislature would have specifically provided for a credit of an overpayment if it intended to provide a remedy.[98]

The court began the opinion by articulating the current rule that when an employee receives an overpayment as a result of payments made in accordance with a Commission order pending judicial review, the employer is not entitled to reimbursement of the funds.[99] The court then noted that the Act precludes any stay of the Commission's award pending judicial review and that the purpose of this statu-

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91. *Id.* at 1334.
92. *Id.* at 1335.
93. *Id.* at 1337 (citation omitted).
94. *Id.*
95. *See* MD. CODE ANN., LAB. & EMPL. § 9-310.1(a) (1999). The statute provides:
> In any administrative action before the Commission, if it is established by a preponderance of the evidence that a person has knowingly obtained benefits under this title to which the person is not entitled, the Commission shall order the person to reimburse the insurer [or the] self-insured employer . . . for the amount of all benefits that the person knowingly obtained and to which the person is not entitled.

Id. There was no claim or finding in this case that Miller knowingly received benefits to which she was not entitled. *Sealy*, 356 Md. at 470, 740 A.2d at 599.
96. *Sealy*, 356 Md. at 470, 740 A.2d at 598-99.
97. *Id.* at 466-67, 740 A.2d at 597.
98. *Id.* at 466, 740 A.2d at 597.
99. *Id.*, 740 A.2d at 596.

tory provision is to ensure an employee's compensation.[100] The court reasoned that the legislature's intent to compensate a worker during an appeal precludes an employer from recovering those payments, even if the award is later vacated.[101] The court acknowledged that there are numerous other situations, aside from those involving judicial review, which might result in overpayment to an employee.[102]

The court rejected Sealy's argument that the Commission, as prescribed by statute, possessed broad power to reopen and modify previous awards, including the power to apply credits for overpayments.[103] The court explained that, in applying a credit for the overpayment of temporary total disability benefits to an award of permanent partial disability benefits, the Commission went beyond the reopening or modifying authority granted under section 9-736(b) of the Labor and Employment Article.[104] Rather, the court reasoned that the period of time during which the Commission was allowed to modify the temporary total disability benefit ended upon the termination of the vocational rehabilitation period.[105] The court concluded that the Commission actually credited the overpayment to a *new* and entirely *separate* benefit award, an act that exceeded its power to review and modify *existing* awards.[106]

In qualifying the Commission's power to modify an award, the court recognized that, although the power was broad, the Commission was not entitled to ignore the legislative scheme or relevant case law governing the Commission's boundaries.[107] The *Sealy* court relied on decisions that established the notion that there are four separate disability awards available to employees through workers' compensa-

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100. *Id.*, 740 A.2d at 596-97.

101. *Id.*

102. *Id.* at 467, 740 A.2d at 597 (citing GILBERT & HUMPHREYS, *supra* note 11, § 7.14).

103. *Id.*

104. *Id.* at 467-68, 740 A.2d at 597. MD. CODE ANN., LAB. & EMPL. § 9-736(b) (1999) provides:

> (1) The Commission has continuing powers and jurisdiction over each claim under this title.
>
> (2) Subject to paragraph (3) of this subsection, the Commission may modify any finding or order as the Commission considers justified.
>
> (3) Except as provided in subsection (c) of this section, the Commission may not modify an award unless the modification is applied for within 5 years after the last compensation payment.

Id.

105. *Sealy*, 356 Md. at 467-68, 740 A.2d at 597.

106. *Id.* at 468, 740 A.2d at 597.

107. *Id.* The court noted that the credit ordered ignored a line of cases including *Gorman* and *Oros*. *Id.*

tion.[108] Each of these four awards are given for different compensable events depending on the nature and extent of the worker's injury.[109] The court then concluded that the Commission's modification power does not extend to the reduction of an award for the sole reason of reimbursing an employer for the overpayment of a separate award that has already terminated.[110] The *Sealy* court found that offsetting overpayment of one award by reducing the amount of another distinct award undermines the fundamental purpose of workers' compensation law, which is to compensate each employee in accordance with the severity of his or her individual injury.[111] Therefore, the court relied on the legislature's purpose in creating separate disability awards to reject the Commission's authority to reduce the payment of a future award because of an overpayment of a past, separate award.[112]

4. Analysis.—The *Sealy* court's decision is consistent with Maryland case law denying reimbursement to employers who have overpaid benefits to employees.[113] The consistency of the decision, however, does not negate the fact that an inequitable result was reached when Miller retained benefits to which she was not entitled and Sealy was unable to recover its money.[114] In its decision, the court declined to address an employer's right to recover overpayments under a common-law theory of unjust enrichment.[115] Courts and legislatures in other jurisdictions have recognized that at least three factual situations warrant the application of a theory of restitution in the

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108. *Id.* at 468-69, 740 A.2d at 597-98.

109. *Id.*, 740 A.2d at 598.

110. *Id.* at 470, 740 A.2d at 599.

111. *Id.* at 469, 740 A.2d at 598.

112. *Id.* at 470, 740 A.2d at 598.

113. *See, e.g.*, Philip Elecs. N. Am. v. Wright, 348 Md. 209, 223, 703 A.2d 150, 156 (1997) (holding that the Act does not provide for an employer to offset payments made before an award was reduced against the future payment of the total amount of the award); Mayor of Balt. v. Oros, 301 Md. 460, 466, 483 A.2d 748, 751 (1984) (concluding that the Act does not allow two distinct awards to offset one another when there has been an overpayment of one); St. Paul Fire & Mar. Ins. Co. v. Treadwell, 263 Md. 430, 437-38, 283 A.2d 610, 615 (1971) (holding that the Act does not provide for an employer's reimbursement of an award that is paid to an employee while judicial review is pending and the award is later vacated).

114. *See Sealy*, 356 Md. at 463-64, 740 A.2d at 595.

115. *Id.* at 470, 740 A.2d at 598-99. The *Sealy* court noted that there are occasions in which an employee's receipt of an overpayment of benefits may "create at least the illusion and maybe the reality of an unjust enrichment." *Id.* However, the court concluded that the possibility of an overpayment is assumed in the statutory scheme, and if the legislature had intended to provide recovery in the form of restitution, it, not the court, would have to provide for the remedy. *Id.*, 740 A.2d at 598. The court held that there was no statutory basis for ordering recovery in the form of a credit and thus declined to do so. *Id.*, 740 A.2d at 599.

context of overpayment of workers' compensation benefits: fraud, erroneous disbursement of compensation, and a vacated award.[116] The factual circumstances of *Sealy* fall within the erroneous disbursement of compensation category, and restitution could have corrected Miller's unjust enrichment. In failing to consider the theory of restitution as a means of recovery, the court passed up an opportunity to urge the legislature to revisit this topic and amend the Act to provide a remedy to employers.

a. Consistent with Precedent Denying Recovery.—Consistent throughout the line of decisions denying reimbursement for overpayments is the court's deference to the legislature's silence with respect to that remedy.[117] Thus, the *Sealy* court's decision to affirm the Court of Special Appeals is consistent with Maryland case law. While the court began by examining decisions that precluded recovery of payments made pending judicial review, it recognized that *Sealy* did not involve payments made while judicial review was pending.[118] The court continued by examining the reasoning used to deny recovery in

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116. *See, e.g.*, Lucey v. Workmen's Comp. Appeal Bd., 732 A.2d 1201, 1204 (Pa. 1999) (concluding that the equitable doctrine of restitution enabled an employer to receive a credit for payment of an award to an employee where the employee reached a settlement with his medical provider); 4934, Inc. v. D.C. Dep't of Employment Servs., 605 A.2d 50, 55 (D.C. 1992) (holding that, in order to prevent the unjust enrichment of an employee, the District of Columbia Department of Employment Services may order a credit in the amount overpaid against the future payment of benefits to the employee); Reil v. State Comp. Mut. Ins. Fund, 837 P.2d 1334, 1336 (Mont. 1992) (holding that, despite the fact that the state worker's compensation act does not contain a provision allowing for restitution as a remedy, the State Fund is entitled to restitution of benefits paid that were subsequently reversed on appeal); *see also* GA. CODE ANN. § 34-9-245 (Supp. 2000) (providing that if the workers' compensation board finds that a claimant has received an overpayment of benefits for any reason, the board has the authority to order repayment); HAW. REV. STAT. ANN. § 386-52 (Michie 1999) (providing that any overpayments made by an employer may be deducted from future payments to the employee, and if an overpayment cannot be credited, a reimbursement may be ordered); MINN. STAT. § 176.179 (Supp. 2000) (providing that when a claimant has received a mistaken overpayment, the compensation may be taken as a partial credit against future payments, so as not to exceed twenty percent of the amount otherwise payable); OR. REV. STAT. § 656.268 (1999) (providing that an employer may offset any compensation payable to an employee in order to recover for an overpayment of a claim); VA. CODE ANN. § 65.2-520 (1995 & Supp. 2000) (providing that payments made by an employer which were not due to the employee may be deducted from the future amount to be paid as compensation).

117. *See supra* notes 69-76 and accompanying text (describing the line of Maryland cases which have denied reimbursement for overpayments).

118. *See Sealy*, 356 Md. at 466-67, 740 A.2d at 596-97 (reviewing *St. Paul Fire & Marine Insurance Co. v. Treadwell*, 263 Md. 430, 283 A.2d 601 (1971), and *Philip Electronics North America v. Wright*, 348 Md. 209, 703 A.2d 150 (1997), which involved overpayment pending judicial review, and then recognizing that there are a variety of other circumstances that may lead to overpayment of an employee).

cases in which an employer overpaid an employee for reasons apart from a pending judicial review.[119] The constant theme throughout both lines of cases, and the reasoning that the court adopted in *Sealy*, is an analysis of legislative intent that gives deference to the statutory scheme.[120]

The decision in *Sealy* is consistent with Maryland precedent denying employers a remedy under a theory of unjust enrichment, because the court again concluded that statutory silence indicated a legislative intent to deny an employer's common-law remedy.[121] In the cases pending judicial review of the Commission's original order, the court reasoned that the legislature enacted the "no stay" provision to ensure the compensation of workers.[122] The court assumed that the legislature was aware of the possibility that payments would be made to employees and awards would be vacated on appeal, and therefore assumed that the absence of a recovery provision was indicative of the legislature's intent to deny recovery.[123] Similarly, in *Sealy*, and in other cases which did not involve the "no stay" provision,[124] the court noted that the legislature had enacted a statute providing four distinct

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119. *Id.* at 467-68, 740 A.2d at 597 (examining *Mayor of Baltimore v. Oros*, 301 Md. 460, 483 A.2d 748 (1984), and *Gorman v. Atlantic Gulf & Pacific Co.*, 178 Md. 71, 12 A.2d 525 (1940), and noting that such precedent precludes recovery of an overpayment by way of a credit against a future unpaid award).

120. *Id.* at 466-69, 740 A.2d at 597-98. The court first enunciated the rule that an employer is not entitled to the recovery of payments made pending judicial review and acknowledged that "[a] major underpinning of that rule is the 'no stay' provision of the statute." *Id.* at 467, 740 A.2d at 597. The court then noted that the rule that an employer may not receive a credit for the overpayment of one award against the future payment of a separate award is based on the legislative intent of creating four separate and distinct benefit awards that serve unique purposes. *Id.* at 468-69, 740 A.2d at 598.

121. *Id.* at 470, 740 A.2d at 598.

122. *See, e.g., Treadwell*, 263 Md. at 439, 283 A.2d at 606 (noting that the language of the "no stay" provision in the statute "reflects a legislative intent to preclude 'recovery back' upon any theory, except fraud perhaps"); *see also Wright*, 348 Md. at 223, 703 A.2d at 156 (inferring that because the General Assembly did not enact a provision allowing an employer to offset payments made prior to the reduction of an award, it considered and rejected such a possibility).

123. *See Treadwell*, 263 Md. at 437-38, 283 A.2d at 605. The court explained that

> when the Legislature enacted the 'no stay' provision . . . it must have foreseen the possibility, and as well the probability, that payments would be made to claimants whose awards subsequently would be vacated on appeal. That it made no provision for the restitution of those payments suggests to us that restitution was considered and rejected . . . .

Id.

124. *See, e.g., Oros*, 301 Md. at 462-63, 482 A.2d at 749 (considering whether an employer was entitled to a credit for the difference between the amount of temporary total disability ordered and the employee's full weekly wage against a future permanent partial disability award).

possible benefits for injuries of various degrees of severity.[125] The court assumed that the legislature was aware that overpayments might be made to employees, but that the General Assembly had failed to enact a provision granting employers a means of recovery in circumstances other than when the person has knowingly received funds to which she is not entitled.[126] The decision in *Sealy*, therefore, is consistent with Maryland precedent denying employers a remedy under a theory of unjust enrichment. Other jurisdictions, however, have not interpreted similar statutory silence to be a clear indicator of the legislature's intent to preclude common-law principles of restitution and unjust enrichment.

b. Courts in Other Jurisdictions Grant Recovery Based on Restitution.—Unjust enrichment occurs when a person retains a benefit, in the form of money or property, which rightfully belongs to another.[127] When a person is unjustly enriched, he is required to make restitution to the injured party in an amount that will restore him to his former position.[128] A claim for restitution based on a theory of unjust enrichment will only be successful if it would be unjust for the other party to keep the benefit.[129] Unjust enrichment is a concept that is common to workers' compensation proceedings, as courts are frequently presented with questions of benefit modifications or reimbursement of overpayments.[130] Several state courts allow claims for restitution to prevail on theories of unjust enrichment in circumstances in which the benefits are fraudulently retained, the payments are made erroneously, or the benefit awards are vacated on appeal.[131]

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125. *Sealy*, 356 Md. at 468-69, 740 A.2d at 598; *see also* Gorman v. Atl. Gulf & Pac. Co., 178 Md. 71, 78, 12 A.2d 525, 529 (1940) (holding that "there may be distinct, consecutive and cumulative awards of compensation for the periods of temporary total disability and of permanent partial disability under the Maryland Act" because the four awards serve as "separate and unitary period[s] of compensation").

126. *Sealy*, 356 Md. at 470, 740 A.2d at 598-99 (concluding that because the prospect of overpayment is "implicit in the overall legislative scheme and, if it is to be corrected by allowing a recovery, either directly or in the form of a credit against another award, the Legislature will have to provide that correction").

127. RESTATEMENT OF THE LAW OF RESTITUTION § 1 & cmt. (a) (1937).

128. *Id.*

129. *Id.* § 1 & cmt. (c).

130. *See, e.g.*, St. Paul Fire & Mar. Ins. Co. v. Treadwell, 263 Md. 430, 283 A.2d 601 (1971) (involving a situation in which the Commission erroneously granted a workers' compensation award); Philip Elecs. N. Am. v. Wright, 348 Md. 209, 703 A.2d 150 (1997) (discussing an employer's right to recover an overpayment made to an employee).

131. *See supra* notes 43-61 and accompanying text (examining cases in which state courts allowed restitution in each of the three factual circumstances).

(1) Fraudulent Retention of Benefit.—A common situation that warrants an application of the doctrine of unjust enrichment involves an employee's fraudulent retention of benefits paid by the employer. In both *Hajnas v. Engelhard*[132] and *Glen Alden Corp. v. Tomchick*,[133] widow beneficiaries remarried and failed to advise their former spouses' respective employers of this fact, therefore fraudulently retaining benefits to which they were not entitled.[134] Both courts held that when an employee is unjustly enriched as a result of fraud, restitution is an appropriate remedy for the employer.[135]

The Maryland Legislature, consistent with other jurisdictions, correctly recognized the need for an equitable remedy in cases of a claimant's fraudulent retention of an overpayment.[136] The Maryland Workers' Compensation Act grants the Commission the power to order the overpaid claimant to reimburse the employer in cases when the claimant has knowingly retained benefits to which he is not entitled.[137] The legislature's recognition of restitution as a remedy in this situation, however, is too narrow and fails to provide a remedy for parties such as Sealy who do not allege any fraud on the part of the claimant.[138] The remedy, therefore, should be broadened to apply to other factual situations, as it does in other jurisdictions.

(2) Erroneous Disbursement of Benefit Payments.—Erroneous disbursement of benefit payments is another circumstance in which courts in other states have allowed a common-law remedy of restitution to correct the unjust enrichment of an employee. For example, in *Lucey v. Workmen's Compensation Appeal Board*,[139] the Pennsylvania Supreme Court allowed an employer to recover a mistaken overpay-

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132. 555 A.2d 716 (N.J. 1989).

133. 130 A.2d 719 (Pa. Super. Ct. 1957).

134. *Hajnas*, 555 A.2d at 717; *Glen Alden*, 130 A.2d at 720.

135. *Hajnas*, 555 A.2d at 719; *Glen Alden*, 130 A.2d at 721.

136. MD. CODE ANN., LAB. & EMPL. § 9-310.1(a) (1999) provides:

> In any administrative action before the Commission, if it is established by a preponderance of the evidence that a person has knowingly obtained benefits under this title to which the person is not entitled, the Commission shall order the person to reimburse the insurer [or] self-insured employer . . . for the amount of all benefits that the person knowingly obtained and to which the person is not entitled.

Id.

137. *Id.*

138. *See Sealy*, 356 Md. at 470, 740 A.2d at 598-99 (stating that there was no claim or factual finding that Miller knowingly retained the benefits and acknowledging that MD. CODE ANN., LAB. & EMPL. § 9-310.1(a) does not provide Sealy with a remedy in this case).

139. 732 A.2d 1201 (Pa. 1999).

ment, relying on a theory of restitution.[140] The *Sealy* case involved an erroneous disbursement of compensation to Miller,[141] and would therefore qualify for restitution under the *Lucey* court's reasoning. Maryland cases illustrate a long history of the judiciary's reluctance to broadly interpret law in the workers' compensation area, as it strictly construes the legislature's intent and defers to the plain meaning of the Act.[142] While Maryland courts could adopt the Pennsylvania court's approach of applying the common-law remedy of restitution to correct an error which occurred within a statutory scheme, it seems unlikely and inconsistent with Maryland's established statutory interpretation principles.

(3) Vacated Award on Appeal.—A third situation in which the doctrine of unjust enrichment is appropriate occurs when a benefit is originally awarded and is subsequently reversed on appeal after the employee has received payments. For example, in *Reil v. State Compensation Mutual Insurance Fund*,[143] the Montana Supreme Court decided that the state was entitled to reimbursement of all compensation paid pursuant to an order of the Workers' Compensation Court after this order was later vacated on appeal.[144] While the *Sealy* case does not involve an award that was vacated on appeal, Maryland case law clearly articulates the rule denying restitution in such cases.[145] In order for the Maryland courts to recognize a remedy in such a case, it seems clear that the legislature would have to amend the Act to include an explicit remedial provision.[146]

In each of the three preceding factual situations—fraudulent retention of benefits, erroneous disbursement of benefit payments, and awards vacated on appeal—the court recognized that because of an overpayment of benefits, one party was unjustly enriched, and therefore a remedy of restitution was warranted.[147] The court reached this

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140. *Id.* at 1204.

141. *Sealy*, 356 Md. at 464-65, 740 A.2d at 595-96.

142. *See supra* notes 43-76 (describing the Maryland cases which deny restitution for the unjust enrichment of claimants based on the legislature's silence as to a remedy in the Act).

143. 837 P.2d 1334 (Mont. 1992).

144. *Id.* at 1337.

145. *See supra* notes 43-61 and accompanying text (reviewing the line of Maryland cases establishing that overpayments made as a result of a vacated award shall not be reimbursed to the employer).

146. *See supra* notes 77-94 and accompanying text (discussing the remedial provisions used in other states).

147. *See* Reil v. State Comp. Mut. Ins. Fund, 837 P.2d 1334, 1337 (Mont. 1992) (reimbursing the state for payments made before an order was later vacated on appeal); Hajnas v. Engelhard, 555 A.2d 716, 719 (N.J. 1989) (holding that when an employee is unjustly

conclusion despite the fact that the statutes were silent with respect to reimbursement of overpayments.[148] These examples reflect jurisdictions in which the judiciary has not interpreted statutory silence to indicate an intent to bar recovery. The overpayment made in *Sealy* clearly fits within the category of erroneous disbursement of payments, causing one party to be unjustly enriched.[149] As the decisions in these jurisdictions indicate, it is within the court's power to recognize the common-law remedy of restitution in each of the above circumstances, despite statutory silence. If the court were to recognize this common-law remedy, however, it would be initiating a notable shift in the application of this statute. The equitable principles of restitution warrant such a shift. At a minimum, the court could have urged the Maryland Legislature to revise the Act to include a remedial provision applicable in situations of unjust enrichment.

c. Other Jurisdictions' Statutory Provisions for Restitution.—The *Sealy* court denied recovery for the overpayment of a benefit by deferring to the legislature and construing the Act's silence as to a remedy as an affirmative denial of that remedy.[150] In light of this unjust result, it is important to note that Maryland's statutory scheme, as in other jurisdictions, could incorporate a remedy to correct unjust enrichment.[151] While a minority of states recognize an employer's common-law right to restitution of overpayments in workers' compensation cases, some jurisdictions have enacted statutory provisions that provide a remedy for employers under certain circumstances.[152]

(1) Credit Against Future Benefit Payment.—One method of recovery for an employer who has overpaid an employee is to apply a credit against the future payment of the same award or a separate

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enriched as a result of fraud, restitution is an appropriate remedy for the employer); Lucey v. Workmen's Comp. Appeal Bd., 732 A.2d 1201, 1204 (Pa. 1999) (allowing restitution to correct an erroneous payment of benefits).

148. *See supra* notes 117-146 and accompanying text (indicating that in each case the courts applied the common-law remedy with no explicit authorization from the legislatures).

149. *See Sealy*, 256 Md. at 463, 740 A.2d at 595 (stating that "[a]pparently through oversight, an employer continued to make temporary total disability payments to a workers' compensation claimant after the employer became aware that the claimant had reached maximum medical improvement and was therefore no longer eligible for those payments").

150. *Id.* at 467, 740 A.2d at 597.

151. *See infra* notes 153-174 and accompanying text (reviewing various jurisdictions' remedial statutory provisions).

152. *Id.*

award instead of forcing the employee to reimburse the employer the amount overpaid. For example, the Virginia workers' compensation statute includes a broad provision that allows a credit whenever an employer has made a payment to an employee that was not due or payable at the time it was made.[153] However, to ensure that an employee does not lose his entire award, the statute provides that the deduction against the future payment of a benefit award shall not exceed one-fourth the amount of the weekly payment ordered.[154] Similarly, the Oregon workers' compensation statute contains a provision that allows a credit against future payment of the same award or a separate award to offset an employer's overpayment.[155] The Oregon statute also states that the amount of such recovery shall not exceed twenty-five percent of the future award.[156]

Both the Virginia and Oregon statutes balance the competing interests of the employee and the employer by allowing an employer to be reimbursed by lowering its future payment obligations while at the same time protecting an employee from a complete loss of benefits.[157] Applying this provision to the *Sealy* case would have provided a more just result, as Miller would not have had to reimburse her employer out of her own pocket, and would have had time to adjust her reliance on the benefit payments to accommodate the slight future reduction that would allow Sealy to recover its funds.[158] These provisions con-

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153. VA. CODE ANN. § 65.2-520 (1985 & Supp. 2000). The statute provides:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this title were not due and payable when made, may, subject to the approval of the Commission, be deducted from the amount to be paid as compensation provided that, in the case of disability, such deductions shall be made by reducing the amount of the weekly payment in an amount not to exceed one-fourth of the amount of the weekly payment for as long as is necessary for the employer to recover his voluntary payment.

Id.

154. *Id.*

155. OR. REV. STAT. § 656.268 (13)(a) (1999) provides:

> An insurer or self-insured employer may offset any compensation payable to the worker to recover an overpayment from a claim with the same insurer or self-insured employer. When overpayments are recovered from temporary disability or permanent total disability benefits, the amount recovered from each payment shall not exceed 25 percent of the payment, without prior authorization from the worker.

Id.

156. *Id.*

157. *See* VA. CODE ANN. § 65.2-520 (allowing an employer to recover an overpayment not to exceed one-fourth of the amount of the weekly payment ordered); OR. REV. STAT. § 656-268(13)(a) (allowing an employer to recover an overpayment not to exceed twenty-five percent of the future award).

158. *See supra* note 157.

tain safeguards that limit the possible amount of recovery to avoid imposing a hardship on the claimant.[159] If contained in the Maryland Act, the *Sealy* court could have applied this remedial provision to reach a just result in this case.

(2) Combination of Credit and Reimbursement.—Several states provide for the combination of a credit against the future payment of benefits and the reimbursement of the overpaid funds.[160] For example, the Minnesota workers' compensation statute denies a refund to an employer when the payment is made under a mistake of fact or law.[161] However, if the employee is entitled to receive further compensation for the same injury, the mistaken payment may be applied as a credit to the future payment obligations if it does not exceed twenty percent of the award.[162] The statute only allows an employer to be refunded an overpayment if the compensation was not received in good faith by the employee.[163]

Hawaii's Workers' Compensation Act utilizes another combination of credit and reimbursement.[164] The statute provides that if an employer makes a payment to an employee that was not payable when made, the overpayment may be deducted from the future amount payable, provided that the employer notify the employee of the reduction, and the deduction only shortens the period of compensation and not the amount of weekly payments.[165] The statute also provides

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159. *See supra* note 157.

160. *See infra* notes 161-169 and accompanying text (describing provisions in Minnesota's, Hawaii's, and Kansas's statutes which combine a credit and reimbursement).

161. MINN. STAT. ANN. § 176.179 (West 1993 & Supp. 2000). The statute provides:

> [N]o lump sum or weekly payment, or settlement, which is voluntarily paid to an injured employee . . . by an employer or insurer . . . shall be refunded to the paying employer or insurer in the event that it is subsequently determined that the payment was made under a mistake in fact or law by the employer or insurer. When the payments have been made to a person who is entitled to receive further payments of compensation for the same injury, the mistaken compensation may be taken as a partial credit against future periodic benefits. The credit . . . shall not exceed 20 percent of the amount that would otherwise be payable.

Id.

162. *Id.*

163. *Id.* The statute provides that "[w]here the commissioner or compensation judge determines that the mistaken compensation was not received in good faith, the commissioner or compensation judge may order reimbursement of the compensation." *Id.*

164. *See* HAW. REV. STAT. ANN. § 368-52 (Michie 1999).

165. *Id.* The statute provides:

> (a) Any payments made by the employer to the injured employee during the employee's disability or to the employee's dependents which by the terms of this chapter were not payable when made, shall be deducted from the amount payable as compensation subject to the approval of the director; provided that:

that if the Commission cannot credit the overpayment, the commissioner shall order the employee to reimburse the employer.[166]

Both the Minnesota and Hawaii statutes allow the employer a remedy for overpayment, primarily through a credit to the future payment of an employee, which demonstrates the intent to protect the employee.[167] However, if the employee has received the overpayment in bad faith or will not receive future payments from the same employer, the legislature has provided for an employer to recover its loss.[168] These statutory provisions are equitable compromises of the competing objectives of the provision.

The Kansas Workers' Compensation Act is similar to that of Hawaii in that it provides that the Commission may order a credit against future compensation in the amount of overpayment or reimbursement of the overpayment, not by the employee, but by the workers' compensation fund.[169] This statutory provision allows an employer to recover overpayments made pending judicial review, while at the same

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(1) The employer notifies the injured employee and the director in writing of any such credit request stating the reasons for such credit and informing the injured employee that the employee has the right to file a written request for a hearing to submit any evidence to dispute such a credit;
(2) The deduction shall be made by shortening the period during which the compensation must be paid, or by reducing the total amount for which the employer is liable and not the amount of weekly benefits;
(3) If overpayment cannot be credited, the director shall order the claimant to reimburse the employer.

Id.

166. *Id.*

167. *Id.*; MINN. STAT. ANN. § 176.179 (West 1993 & Supp. 2000).

168. HAW. REV. STAT. ANN. § 368-52; MINN. STAT. ANN. § 176.179.

169. KAN. STAT. ANN. § 44-556(d)(1) & (2) (1993). The statute provides:

If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer or the employer's insurance carrier during the pendency of review under this section and the amount of compensation awarded by the board is reduced or totally disallowed by the decision on the appeal or review, the employer and the employer's insurance carrier, except as otherwise provided in this section, shall be reimbursed from the workers compensation fund . . . . If any temporary or permanent partial disability or temporary or permanent total disability benefits have been paid to the worker by the employer or the employer's insurance carrier during the pendency of review under this section and the amount of compensation awarded for such benefits by the board is reduced by the decision on the appeal or review and the balance of compensation due the worker exceeds the amount of such reduction, the employer and the employer's insurance carrier shall receive a credit which shall be applied as provided in this subsection (d)(2) for all amounts of such benefits which are in excess of the amount of such benefits that the worker is entitled to as determined by the final decision on review or appeal.

Id.

time protecting the interest of the employee.[170] A statute that provides an employer with a remedy either through a credit or a reimbursement would be applicable in a case like *Sealy*. However, the Maryland statute does not contain safeguards that would prevent imposing a hardship on the claimant and therefore seems to be an unlikely choice for the Maryland Legislature.

(3) Reimbursement by Claimant of Overpayment.—A third type of statutory remedial provision provides the employer with an unqualified reimbursement for overpaid benefits.[171] The Georgia workers' compensation statute provides that an employer shall receive reimbursement for overpayments made to an employee for any reason.[172] This provision of the statute is less protective of an employee's interests than those that provide for a credit of future payments only; however, much discretion is left to the workers' compensation board.[173] It seems less likely that the Maryland Legislature would adopt a provision of this sort, as it would impose a harsh burden on claimants.[174] In the *Sealy* case, Miller would have had to reimburse Sealy out of her own pocket, which is an undesirable and unduly harsh result.

As exemplified by the various statutory schemes, legislatures in other states provide different forms of recovery in an attempt to balance the employer's interest in recouping lost funds with the employee's interest in retaining benefits that they have relied upon. While the application of each statute may yield a distinct result, the fundamental principle of allowing restitution in cases where one party has been unjustly enriched is common to all. By adopting one of the statutory schemes set forth above or a combination of the elements present in several, the Maryland Legislature would ensure that a more just result is reached in cases such as *Sealy*.

5. Conclusion.—The *Sealy* court's holding—that the Workers' Compensation Commission is not authorized to order a credit against the future payment of an employee's permanent partial disability ben-

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170. *See id.*

171. *See* GA. CODE ANN. § 34-9-245 (1998 & Supp. 2000).

172. *Id.* The statute provides: "Should the board find that a claimant has received an overpayment of income benefits from the employer, for any reason, the board shall have the authority to order repayment on terms acceptable to the parties or within the discretion of the board." *Id.*

173. *See id.*

174. *See* Bowen v. Smith, 342 Md. 449, 454, 677 A.2d 81, 84 (1996) (noting that the court has "repeatedly noted that the Maryland Workers' Compensation Act . . . should be construed as liberally in favor of injured workers as its provisions will permit in order to effectuate its broad remedial purpose" (citation omitted)).

efit in order to reimburse an employer for an erroneous overpayment of an employee's temporary total disability benefit—is consistent with prior interpretations of the Act in Maryland. The court's deference to the legislative purpose of workers' compensation benefits is prevalent throughout the decisions leading up to *Sealy*. The *Sealy* court, however, reaches an inequitable result by allowing one party to be unjustly enriched and by denying the other party the common-law remedy of restitution. This decision should prompt an examination by the Maryland Legislature of alternative workers' compensation statutory schemes that would explicitly allow an employer to recover an overpayment, whether by way of a credit against future payments to the claimant or a reimbursement by the claimant.

CLARE D. BRACEWELL

B. *Statutes of Limitations: Examining Their Mandatory Preclusion Effect Even as Part of a Larger Remedial Scheme*

In *Marsheck v. Board of Trustees of the Fire & Police Employees' Retirement System*,[1] the Court of Appeals of Maryland considered whether the denial of special disability benefits, available under the Baltimore City Code to an employee permanently disabled in the line of duty, was proper under the relevant statute of limitations.[2] The plaintiff injured her back more than five years before filing for special disability benefits, but only became permanently disabled one month before the five-year limitations period expired.[3] The court, in its attempt to effectuate the legislature's intent, strictly interpreted the term "injury" under the statute of limitations to effectively preclude Marsheck from recovering special disability benefits.[4]

This case represents the Court of Appeals's first analysis of the statute of limitations set forth in the special disability benefits provision of the Baltimore City Code.[5] In deciding *Marsheck*, the court attempted to reconcile well-established principles regarding the statutory construction of remedial legislation with conflicting principles regarding the interpretation of statutes of limitations.[6] Although the court had the discretion to interpret Marsheck's date of "injury" in her favor, it refused to make an exception to the statute of limitations.[7] The court's unwillingness to carve out such an exception follows precedent, effectuates the legislature's intent, and maintains the value of consistency and predictability inherent in statutes of limitations. Additionally, the court's adherence to precedent reflects its great deference to the inherent consistency and predictability of stat-

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1. 358 Md. 393, 749 A.2d 774 (2000).

2. *Id.* at 397-98, 749 A.2d at 776.

3. *Id.* at 398-99, 749 A.2d at 776-77.

4. *Id.* at 414, 749 A.2d at 785. Special disability benefits generally are awarded to eligible employees who are permanently disabled on the job, while ordinary disability benefits are awarded to permanently disabled employees regardless of the source of the injury. *Id.* at 400 n.2, 749 A.2d at 777 n.2. For a more detailed description of the differences between the two benefits, see *infra* note 27.

5. *See infra* note 10 (setting forth the applicable section of the Baltimore City Code). The Special Disability Benefits section grants disability benefits to those permanently injured on the job, but limits all claims filed five years after the "injury" without restriction. BALT. CITY, MD., CODE art. 22, § 34(e) (2000) [hereinafter Art. 22].

Many other provisions of the retirement system have been disputed and litigated. These decisions offer some insight into the court's ultimate decision in *Marsheck*. These cases will be discussed *infra* in the Legal Background section of this Note. *See infra* Part 2.

6. *Marsheck*, 358 Md. at 403-04, 749 A.2d at 779.

7. *Id.* at 408-09, 749 A.2d at 781-82.

utes of limitations and clarifies how the law should be applied in future claims.

1. The Case.—Charlotte Marsheck applied to the Fire and Police Employees' Retirement System of the City of Baltimore (FPERS), seeking special disability benefits under Article 22 of the Baltimore City Code (the Code).[8] Sections 30 to 45 of the Article created FPERS, which enumerates various retirement benefits available to fire and police employees.[9] Marsheck specifically sought benefits under section 34(e), which provides special disability retirement benefits to an employee who suffers total and permanent incapacitation as a result of an injury arising out of, and in the actual performance of, his or her duty.[10] When an employee seeks benefits under the Code, a hearing examiner from the Board of Trustees determines whether an employee is entitled to such retirement benefits, and the decision may be appealed to the Circuit Court for Baltimore City.[11] The provision, however, contains limiting language that prohibits any employee who became a member on or after July 1, 1979, from recovering for a claim for special disability benefits not filed within five years of the date of the employee's injury.[12]

The facts underlying Marsheck's claim were undisputed.[13] She began her employment as a Baltimore City police officer on August 15, 1985.[14] On February 13, 1992, while performing her duties, Marsheck injured her back.[15] She continued to serve with the Baltimore City Police Department for the next five years. She varied her specific

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8. *Id.* at 397-98, 749 A.2d at 776.

9. Art. 22, § 34 (codifying all available retirement benefits and providing when and to whom they are available).

10. *Marsheck*, 358 Md. at 398, 749 A.2d at 776. Section 34(e) reads:

> *Special Disability Benefits.* Any member who has been determined by the hearing examiner to be totally and permanently incapacitated for the further performance of the duties of his job classification in the employ of Baltimore City, as the result of an injury arising out of and in the course of the actual performance of duty, without willful negligence on his part, shall be retired by the Board of Trustees on a special disability retirement. For any employee who became a member on or after July 1, 1979, any claim for special disability benefits must be filed within 5 years of the date of the member's injury.

Art. 22, § 34(e).

11. Biscoe v. Balt. City Police Dep't, 96 Md. App. 1, 5, 623 A.2d 666, 668-69 (1993) (discussing section 34(e) of the Code).

12. Art. 22, § 34(e). The limiting language was argued by both the appellant and the appellee as a statute of limitations and therefore was interpreted by the Court of Appeals as such. *Marsheck*, 358 Md. at 403-04 & n.5, 749 A.2d at 779 & n.5.

13. *Marsheck*, 358 Md. at 398, 749 A.2d at 776.

14. *Id.*

15. *Id.*

duties, however, as a result of her injury.[16] During this time period, Marsheck underwent various medical treatments, including physical therapy and numerous back surgeries.[17] Marsheck consistently made efforts to continue her employment with the police department.[18] Ultimately, however, on February 6, 1997, a physician found that Marsheck was one-hundred percent disabled and was no longer able to perform her duties as a member of the Baltimore City Police Department.[19] On February 12, 1997, Marsheck applied to the FPERS for special disability benefits.[20]

Pursuant to Article 22 of the Code, the Board of Trustees' hearing examiner held an administrative proceeding[21] to assess Marsheck's eligibility for retirement and to determine whether she was eligible to receive special disability benefits.[22] The FPERS argued that Marsheck was ineligible to receive special disability benefits because her injury occurred more than five years before she filed her application.[23]

Marsheck urged the hearing examiner to adopt a broad construction of "injury" and to determine that her injury occurred when she became permanently disabled, not when she first injured her back.[24] Marsheck justified the broad interpretation by arguing that a strict interpretation would discourage employees from promptly returning to work.[25] She also argued that it would encourage employees to file for special disability benefits prematurely or frivolously, fearing that their claims would be barred by the five-year statute of limitations.[26]

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16. *Id.*

17. *Id.* at 399, 749 A.2d at 776-77.

18. *Id.* at 414, 749 A.2d at 785. The court recognized that Marsheck was "not malingering by pretending to be ill or injured in order to avoid work." *Id.*

19. *Id.* at 399, 749 A.2d at 777.

20. *Id.* Marsheck's attorney failed to notarize the application that the FPERS received on February, 18, 1997, resulting in the return of the application. *Id.* Marsheck's attorney returned the properly notarized application on February 19, 1997. *Id.* The FPERS docketed the application as received on February 25, 1997. *Id.* On appeal, Marsheck advanced two theories for her recovery. The first will be explained in the remaining portion of this section. The second, which is not the focus of this Note, was that Marsheck substantially had complied with the statute and therefore should not have been precluded from recovery because of the statute of limitations. *Marsheck*, 358 Md. at 414, 749 A.2d at 785. The Court of Appeals cursorily dealt with this issue and found that the doctrine of substantial compliance does not apply to statutes that contain a limiting provision. *Id.* at 416, 749 A.2d at 786.

21. *See* Art. 22, § 34(e).

22. *Marsheck*, 358 Md. at 399, 749 A.2d at 777.

23. *Id.*

24. *Id.* at 400, 749 A.2d at 777.

25. *Id.* at 401, 749 A.2d at 778.

26. *Id.*

The examiner, however, agreed with the FPERS and denied Marsheck special disability benefits under section 34(e), but awarded her ordinary disability benefits under section 34(c).[27]

Marsheck filed a timely review in the Circuit Court for Baltimore City, which affirmed the examiner's decision.[28] The Court of Special Appeals affirmed the circuit court's decision.[29] The Court of Appeals granted certiorari to determine the meaning of the word "injury" and, consequently, to determine whether the Court of Special Appeals erred in affirming the circuit court's ruling.[30]

2. *Legal Background.*—

a. Interpreting Remedial Statutes.—The primary goal of statutory interpretation is to ascertain and effectuate the actual intent of the legislature.[31] Indeed, the Court of Appeals of Maryland has explained that "[t]he basic principles of statutory construction as developed by this Court are so frequently recited that brevity in this regard now becomes a virtue . . . . Fundamentally, the object of all statutory construction is to determine and effectuate the enactment's purpose."[32]

When faced with two conflicting constructions of the purpose of a statute, the Court of Appeals seeks to discern the legislature's ultimate goal or objective. In *Kaczorowski v. Mayor of Baltimore*,[33] the Court of Appeals was faced with two opposing interpretations of a statute

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27. *Id.* at 400, 749 A.2d at 777. The hearing examiner awarded Marsheck "ordinary disability retirement benefits" pursuant to section 34(c) of Article 22. *Id.* Ordinary disability benefits are awarded to employees who become permanently incapacitated regardless of the source of the injury. *Id.* at 410, 749 A.2d at 782. Because special disability benefits are awarded to those employees who are permanently incapacitated due to a job-related injury, the retirement benefit is substantially higher. *Id.* at 409, 749 A.2d at 782. The special disability retirement benefit awards a retiree an annuity and two pensions, producing a total retirement benefit equal to one hundred percent of compensation at the time of retirement. Art. 22, § 34(f). The ordinary disability retirement benefit awards a retiree an annuity and one pension, producing a total retirement benefit of not less than one quarter, but not to exceed one half, of compensation at the time of retirement. *Id.* § 34(d).

28. *Marsheck*, 358 Md. at 400, 749 A.2d at 777.

29. *Id.* The Court of Special Appeals decision is unreported.

30. *Id.* at 398, 749 A.2d at 776. The court also set out to determine whether "the Court of Special Appeals err[ed] in failing to apply the 'substantial compliance' standard to Petitioner's untimely filing of her special disabilities benefit application." *Id.* The court, however, quickly disposed of this secondary issue, which is not addressed in this Note. *See id.* at 414-16, 749 A.2d at 785-86.

31. *See, e.g.*, Martin v. Beverage Capital Corp., 353 Md. 388, 399, 726 A.2d 728, 733 (1999); Harbor Island Marina v. Calvert County, 286 Md. 303, 311, 407 A.2d 738, 742 (1979).

32. Briggs v. State, 289 Md. 23, 31, 421 A.2d 1369, 1374 (1980).

33. 309 Md. 505, 525 A.2d 628 (1987).

that facially appeared to abolish a legislatively-created authority with the power to issue revenue bonds.[34] The legislature created the authority in June 1982, but in its attempt to refine it, inadvertently repealed the section of the Maryland Annotated Code that initially created the entity.[35] Kaczorowski argued that because the authority had been created legislatively by the passing of those sections, when the legislature repealed the relevant sections, the authority ceased to exist.[36] In attempting to apply the cardinal rule of statutory interpretation, the court in *Kaczorowski* examined the conflicting provisions of the Maryland Code and first noted that legislation usually has some objective, goal, or purpose.[37] The court characterized its search for legislative intent "as an effort to 'seek to discern [the] general purpose, aim, or policy reflected in the statute.'"[38] In its search, the court determined that the words of the statutes, in light of their purposes and objectives, clearly conveyed that the legislature did not mean to terminate the existing authority.[39] Consequently, the court held that although the statutes conflicted, the authority and its issued bonds were viable.[40]

The court's task of ascertaining a "general purpose, aim, or policy" is easier when interpreting remedial statutes. Remedial statutes are enacted to improve and facilitate remedies already existing for the endorsement of rights and to redress wrongs for injuries.[41] Consequently, slightly different rules of statutory construction govern the interpretation of remedial legislation because the inherent aims and goals are clear.

Remedial statutes, because of their benevolent purpose and nature, are construed liberally to effectuate their remedial purposes.[42] This canon of interpretation is noted most frequently in the interpretation of various provisions of Maryland's Workers' Compensation Act

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34. *Id.* at 512, 525 A.2d at 631.
35. *Id.* at 509, 525 A.2d at 630.
36. *Id.* at 510-11, 525 A.2d at 630.
37. *Id.* at 513, 525 A.2d at 632.
38. *Id.*
39. *Id.* at 517, 525 A.2d at 634.
40. *Id.*
41. EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES 105 (1940).
42. *See, e.g.*, Montgomery County v. McDonald, 317 Md. 466, 472, 564 A.2d 797, 800 (1989) (interpreting section 26(b) of Maryland's Workers' Compensation Act, which provides a two-year statute of limitations for filing a claim for disability or death from occupational disease); Subsequent Injury Fund v. Thomas, 275 Md. 628, 635, 342 A.2d 671, 675 (1975) (interpreting a statute establishing conditions for receipt of compensatory benefits from the Subsequent Injury Fund); Vest v. Giant Food Stores, Inc., 91 Md. App. 570, 575, 605 A.2d 627, 630 (1992) (interpreting the modification provision of Maryland's Workers' Compensation Act).

(the Act), a prime example of remedial legislation.[43] Under the Construction of Title section of the Act, the legislature clearly instructed courts that the Act should be liberally construed to carry out its general purpose.[44] Codified over eighty years ago, the workers' compensation statute intends to protect workers and their families from the various hardships that result from workplace-related injuries.[45] In order to grant benefits to injured workers and their families, the Court of Appeals has consistently construed the Act broadly.

Maryland case law related to various disputed provisions of the Act offers further insight into the court's traditionally broad interpretation of remedial legislation.[46] In *Martin v. Beverage Capital Corp.*,[47] for example, the Court of Appeals broadly interpreted a provision of the Act to ensure that the plaintiff, a survivor of a deceased worker, continued to receive benefits, so long as she continued to be wholly dependent on the benefit.[48] In *Martin*, the plaintiff's husband was killed while operating a helicopter in the course of his employment.[49] A few months after his death, the plaintiff filed a dependency claim with the Workers' Compensation Commission (the Commission), stating that she was "wholly dependent" on her husband at the time of his death.[50] The Commission agreed that the plaintiff was wholly dependent on her husband and awarded her a death benefit of $475 per week for ninety-four weeks.[51] After paying the initial weekly death

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43. *See infra* note 46 and accompanying text (citing cases that liberally construe various sections of the Act).

44. MD. CODE ANN., LAB. & EMPL. § 9-102 (1999).

45. *See* Martin v. Beverage Capital Corp., 353 Md. 388, 398, 726 A.2d 728, 733 (1999) (recognizing that the workers' compensation statute in Maryland is remedial in nature and should be interpreted as such).

46. *See, e.g.*, Lovellette v. Mayor of Balt., 297 Md. 271, 282, 465 A.2d 1141, 1147 (1983) (explaining that "the Workmen's Compensation Act is to be construed as liberally in favor of injured employees as the Act's provisions will permit so as to effectuate its benevolent purpose as remedial social legislation"); Bethlehem-Sparrows Point Shipyard, Inc. v. Hempfield, 206 Md. 589, 594, 112 A.2d 488, 491 (1955) ("The Workmen's Compensation Act should be construed as liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes.").

47. 353 Md. 388, 726 A.2d 728 (1999).

48. *Id.* at 393, 726 A.2d at 730. The applicable provision of the Act, entitled "Wholly dependent individuals," mandates that, "[i]f a surviving spouse who was wholly dependent at the time of death continues to be wholly dependent after $45,000 has been paid, the employer or its insurer shall continue to make payments to the surviving spouse at the same weekly rate during the total dependency of the surviving spouse." MD. CODE ANN., LAB. & EMPL. § 9-681(d).

49. *Martin*, 353 Md. at 394, 726 A.2d at 731.

50. *Id.* at 395-96, 726 A.2d at 732.

51. *Id.*

benefits, the defendants ceased the payments.[52] The plaintiff filed another claim with the Commission, asserting that, although she had a low paying job, she continued to be wholly dependent, and therefore was still entitled to the weekly benefits.[53] The Commission granted the plaintiff's claim and ordered the defendants to continue payment of the weekly benefits.[54] The Court of Appeals affirmed the Commission's order, holding that a spouse continues to be wholly dependent, and therefore remains eligible for continuing workers' compensation death benefits, when he or she has an ongoing dependency on the deceased worker's salary at the time of death.[55]

The court had the discretion to interpret "wholly dependent" to mean dependent on the workers' compensation benefits or dependent on the deceased worker's salary at the time of death.[56] The court's choice in interpreting the term effectively could have awarded or precluded the award of benefits to the plaintiff under the Act.[57] The court applied the canon of broad interpretation of remedial legislation in reaching its decision, noting that the Act should be "'liberally construed so that any ambiguity, uncertainty or conflict is resolved in favor of the claimant, in order to effect the statute's benevolent purposes.'"[58] Consequently, the court awarded the benefits to the claimant.[59]

The court's approach in *Martin* is just one example in a long and consistent line of case law broadly construing remedial legislation. In *Lovellette v. Mayor of Baltimore*,[60] the court held that the claimant, Lovellette, was entitled to a statutory presumption that his injury was compensable under the occupational injury provision of the Workers' Compensation Act even though he had suffered a heart attack that was considered accidental by a board of medical examiners.[61] Lovel-

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52. *Id.* at 396, 726 A.2d at 732.

53. *Id.* at 396-97, 726 A.2d at 732.

54. *Id.* at 397, 726 A.2d at 732.

55. *Id.* at 398, 726 A.2d at 733.

56. *Id.* at 393, 726 A.2d at 731 ("[W]e hold that 'continues to be wholly dependent' as found in § 9-681(d) refers to the surviving spouse remaining wholly dependent on the deceased spouse's income at the time of his or her death, and not the generally lesser amount of workers' compensation benefits.")

57. *Id.* at 398, 726 A.2d at 733.

58. *Id.* at 400, 726 A.2d at 734 (quoting Linder Crane Serv. Co. v. Hogan, 86 Md. App. 438, 443, 586 A.2d 1290, 1292 (1991)).

59. *Id.* at 394, 726 A.2d at 731 (directing that the claimant's workers' compensation death benefits will not suddenly cease at some specific point in time, but instead will continue "so long as her dependency remains").

60. 297 Md. 271, 465 A.2d 1141 (1983).

61. *Id.* at 284-85, 465 A.2d at 1148. The Act encompasses two categories of compensable events. Section 9-503 offers benefits for occupational diseases, which are caused by

lette suffered a heart attack after trying to lift an extremely heavy overhead door in the course of his duty on a fire scene.[62] He was in excellent health and had never suffered from high blood pressure prior to the heart attack.[63] At a hearing before the Commissioner's Medical Board for Occupational Diseases, the Board concluded that the injury was accidental in nature and that Lovellette did not sustain an occupational disease within the coverage of the occupational injury provision of the Act.[64] After the Circuit Court for Baltimore City and the Court of Special Appeals affirmed the Board's finding, the Court of Appeals granted certiorari to determine whether Lovellette was entitled to a presumption that his injury was occupational, even though the disabling heart disease initially manifested itself in the course of a work-related, accidental injury.[65] The court noted that the Act should be construed liberally in favor of injured employees in order to effectuate the Act's benevolent purpose as a form of remedial social legislation.[66] Thus, the court held that nothing in the provision suggested that the statutory presumption did not apply to Lovellette.[67] The court remanded the case so that Lovellette could be afforded a rebuttable presumption,[68] reasoning that "[a]ny uncertainty in the meaning of the statute should be resolved in favor of the claimant."[69]

b. Interpreting Statutes of Limitations.—The Court of Appeals of Maryland has consistently upheld statutes of limitations in a variety of contexts,[70] reasoning that statutes of limitations are clear expres-

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lung diseases, heart diseases, or hypertension resulting in total or partial disability or death and due to the nature of the occupation. MD. CODE ANN., LAB. & EMPL. § 9-503 (2000). Section 9-501 covers an accidental personal injury sustained by an employee arising out of and in the course of his employment. *Id.* § 9-501.

62. *Lovellette*, 297 Md. at 274, 465 A.2d at 1143.

63. *Id.*

64. *Id.* at 275, 465 A.2d at 1143. The Commission's determination that Lovellette's condition resulted from an accidental injury precluded him from recovering workers' compensation benefits under the more beneficial occupational disease provision of the Act. *Id.*, 465 A.2d at 1144.

65. *Id.* at 282-83, 465 A.2d at 1147. It is important to note that the applicable statute states that any disabling condition or impairment of a firefighter's health caused by heart diseases shall be presumed to be compensable under the occupational disease provision. *See* MD. CODE ANN., LAB. & EMPL. § 9-503(a).

66. *Lovellette*, 297 Md. at 282, 465 A.2d at 1147.

67. *Id.* at 284, 465 A.2d at 1148.

68. *Id.* at 284-85, 465 A.2d at 1148.

69. *Id.* at 282, 465 A.2d at 1147.

70. *See, e.g.*, Frederick Rd. Ltd. P'ship v. Brown, 360 Md. 76, 94, 756 A.2d 963, 972 (2000) (reversing the circuit court's grant of summary judgment that dismissed a legal malpractice claim because it was barred by the statute of limitations, but recognizing that "summary judgment is appropriate where the statute of limitations governing the action at issue has expired"); Stein v. Smith, 358 Md. 670, 671, 751 A.2d 504, 504-05 (2000) (holding

sions of the legislature's intent.[71] As a traditional rule, the court strictly construes statutes of limitations, regardless of the purpose or nature of the larger provision.[72] Additionally, the court generally defers to the legislative intent expressed in statutes of limitations and avoids implied exceptions or strained constructions.[73]

Although workers' compensation laws are deemed remedial legislation, the court does not deviate from strictly construing statutes of limitations in reviewing such cases. The statute of limitations provisions are strictly construed despite the remedial nature of the statute and the long-standing principal that remedial statutes should be construed in favor of the injured. For example, in *Montgomery County v. McDonald*,[74] James McDonald, a civilian police dispatcher for the Montgomery County Police Department, suffered a heart attack on August 5, 1977, attributed to stress caused by his employment.[75] Both he and his employer were on notice of the job-related injury, but both failed to file a claim with the Commission for Workers' Compensation.[76] McDonald suffered a second heart attack on August 1, 1984, and subsequently filed a claim for workers' compensation based on

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that the statute of limitations was not tolled by the filing of an action in the name of a corporation whose charter had been forfeited and was never revived); Lumsden v. Design Tech. Builders, Inc., 358 Md. 435, 452, 749 A.2d 796, 805 (2000) (upholding the circuit court's grant of summary judgment because a breach of contract claim was barred by the statute of limitations contained in section 10-204(d) of Maryland's Real Property Article).

71. *See, e.g.*, *Brown*, 360 Md. at 94, 756 A.2d at 972 ("[T]he [legislature's] adoption of statutes of limitation reflect a policy decision regarding what constitutes an adequate period of time for a person of reasonable diligence to pursue a claim.").

72. *See, e.g.*, Hecht v. Resolution Trust Corp., 333 Md. 324, 333, 635 A.2d 394, 399 (1994) ("We have long maintained a rule of strict construction concerning the tolling of the statute of limitations. Absent legislative creation of an exception to the statute of limitations, we will not allow any 'implied and equitable exception to be engrafted upon it.'" (quoting Booth Glass Co. v. Huntingfield Corp., 304 Md. 615, 623, 500 A.2d 641, 645 (1985))). The Court of Appeals has excepted this construction in cases involving fraud and medical and legal malpractice claims. *See Lumsden*, 358 Md. at 442-44, 749 A.2d at 799-801 (explaining that the statute of limitations begins to run when the victim discovers the fraud or mistake, and, in malpractice cases, the statute begins to run when the negligence is discovered).

The "discovery rule" tolls the statute of limitations until the plaintiff knows or should have known that he or she has a cause of action. *Id.* at 443, 749 A.2d at 800. The court in *Marsheck* duly noted that the date of Marsheck's injury was undisputedly February 13, 1992, and declined her "invitation to apply the 'discovery rule'" because her injury was not comparable to a latent injury. *Marsheck*, 358 Md. at 414 n.9, 749 A.2d at 785 n.9.

73. *See* Mayor of Cumberland v. Beall, 97 Md. App. 597, 603, 631 A.2d 506, 509 (1993) (holding that the trial court erred in making an exception to the five-year statute of limitations for modifying workers' compensation awards under the Workers' Compensation Act).

74. 317 Md. 466, 564 A.2d 797 (1989).

75. *Id.* at 468, 564 A.2d at 798.

76. *Id.*

his first heart attack.[77] The applicable provision of the workers' compensation statute contained a two-year statute of limitations that barred any claim for disability filed after two years from the date of the occupational injury.[78] McDonald argued that the two-year statute of limitations should have been tolled because his employer failed to file a claim, which is mandatory after receiving oral or written notice of the injury.[79]

The court refused to toll the statute of limitations, finding that a judicially created exception would change the mandatory command of the two-year limitations provision.[80] The *McDonald* court reasoned that the general purpose of the Workers' Compensation Act—to compensate injured workers—should not be used to interpret the limitations provision because the very existence of a limitations provision in the Act indicates that the legislature deliberately restricted the general compensation purpose.[81] Although not addressed specifically, it is clear that the court gave great deference to the statute of limitations, believing that such a provision is the clearest expression of legislative intent.[82] Although any ambiguities under a remedial legislative scheme should be resolved in favor of the claimant, the court found no ambiguity in the statute of limitations and upheld it without qualification.[83] The court also noted that tolling the statute of limitations would create the possibility of an unending period for filing a claim.[84]

The lower courts in Maryland have consistently followed *McDonald*'s rule of strict adherence to statutes of limitations in remedial legislation. In *Seal v. Giant Food, Inc.*,[85] the Court of Special Appeals refused to toll the five-year statute of limitations for the modification of a workers' compensation award when the insurer paid the claimant early.[86] The claimant, Mary Seal, while working as a cashier for Giant Food, Inc., sustained an accidental injury resulting in carpal tunnel syndrome, for which she filed a claim with the Workers' Compensa-

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77. *Id.*

78. MD. CODE ANN., LAB. & EMPL. § 9-711 (1999).

79. *McDonald*, 317 Md. at 468, 564 A.2d at 798; *see also* MD. CODE ANN., LAB. & EMPL. § 9-711.

80. *McDonald*, 317 Md. at 471, 564 A.2d at 800.

81. *Id.* at 472, 564 A.2d at 800 (quoting Patrick J. Kelley, *Statutes of Limitations in the Era of Compensation Systems: Workmen's Compensation Limitations Provisions for Accidental Injury Claims*, 1974 WASH. U. L.Q. 541, 603).

82. *See id.* ("[A] liberal rule of construction does not mean that courts are free to disregard the provisions comprising the Act.").

83. *Id.* at 472-73, 564 A.2d at 800-01.

84. *Id.* at 473, 564 A.2d at 800.

85. 116 Md. App. 87, 695 A.2d 597 (1997).

86. *Id.* at 96, 695 A.2d at 601.

tion Commission.[87] The Commission initially awarded her temporary total and partial disability benefits.[88] On July 1, 1986, the Commission awarded her permanent partial disability, with payments to begin retroactively on January 5, 1986, for a period of two hundred weeks.[89]

The insurer, with no objection from Seal, paid her monthly, instead of weekly, which made her last check due on February 14, 1989, one month earlier than under a weekly payment cycle.[90] After visiting her treating doctor, who found that Seal continued to have problems stemming from the 1983 accident, Seal filed a petition to reopen her claim on February 25, 1994.[91] Neither party disputed that Seal had filed her petition to reopen her claim more than five years after the last date of receiving compensation.[92] Seal, however, argued that she would not have fallen outside the five-year statute of limitations if she had received weekly payments.[93] In effect, Seal urged the court to create an exception to the statute of limitations for her situation because her last payment of compensation was made prior to the due date.[94] The Court of Special Appeals, quoting and applying the rule in *McDonald*, strictly construed the statute of limitations by refusing to toll the five-year period and consequently denied Seal's petition to modify her compensation award.[95] The court noted that the liberal rule of construction does not mean that courts are free to disregard the provisions comprising the Act.[96] The court's position in *McDonald* and *Seal* indicate that the Court of Appeals is unlikely to create exceptions to legislatively mandated limitations provisions.

The court's opinions also reflect its unwillingness to make exceptions to statutes of limitations regardless of the harsh outcome to the plaintiff. For example, in *Vest v. Giant Food Stores, Inc.*,[97] the Court of Appeals prohibited the modification of a workers' compensation claim in which the appellant attempted to modify his claim after the five-year statute of limitations had passed.[98] The claimant, Vest, injured his back on November 3, 1980, in the course of his employment

87. *Id.* at 90, 695 A.2d at 598.
88. *Id.*
89. *Id.*
90. *Id.* at 91, 695 A.2d at 598.
91. *Id.*, 695 A.2d at 599.
92. *Id.*
93. *Id.* at 92, 695 A.2d at 599.
94. *Id.* at 94-95, 695 A.2d at 600.
95. *Id.* at 96, 695 A.2d at 601.
96. *Id.* at 95, 695 A.2d at 600-01.
97. 91 Md. App. 570, 605 A.2d 627 (1992).
98. *Id.* at 587, 605 A.2d 636.

with Giant Food Stores.[99] The Commission awarded Vest $241 per week for as long as he retained the status of temporary total disability.[100] Vest subsequently needed two disc surgeries as a result of the accidental injury and sought to modify his award nine years later.[101] The Commission denied Vest's petition to modify his award on the ground that his request was barred by the statute of limitations.[102] The Court of Appeals upheld the Commission's order, characterizing Vest's argument as "an objection to the application of the limitation period in the instant case because the result would be anomalous and cruel."[103] In refusing to permit the appellant to modify his claim, the court held that the term in the limitations provision was "plain and unambiguous," and left no room for interpretation.[104]

The court tends to justify its strict adherence to statutes of limitations by invoking public policy justifications. In *DeBusk v. Johns Hopkins Hospital*,[105] for example, the Court of Appeals refused to toll the two-year statute of limitations for accidental injury benefits under the Act when DeBusk filed her claim two years and one month after her accidental injury.[106] DeBusk argued that the two-year limitations period should not have begun until she was aware that she had a compensable injury.[107] The court refused to accept DeBusk's interpretation, reasoning that predictability and administrative ease come at the price of some flexibility in unique circumstances, but that the court could not make an exception in every circumstance.[108] The court recognized that a statute attempting to address all possible exceptions would lose its valuable characteristic of predictability.[109] Thus, the court found that a statute of limitations triggered by an externally verifiable date is a "classic example of an objective, bright-line rule which fosters predictable outcomes in otherwise unpredictable situations."[110] Consistent with *McDonald*, *Vest*, and *Seal*, the court gave greater deference to the public policy justifications behind statutes of limitations than to the arguably more equitable outcome in the case.

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99. *Id.* at 572, 605 A.2d at 628.
100. *Id.* at 573, 605 A.2d at 629.
101. *Id.* at 574, 605 A.2d at 629.
102. *Id.*
103. *Id.* at 587, 605 A.2d at 636.
104. *Id.*
105. 342 Md. 432, 677 A.2d 73 (1996).
106. *Id.* at 434, 677 A.2d at 74.
107. *Id.* at 436-37, 677 A.2d at 75.
108. *Id.* at 438, 677 A.2d at 76.
109. *Id.* at 439, 677 A.2d at 76.
110. *Id.*

c. Interpreting the Baltimore City Code.—Although the Court of Appeals has not specifically addressed the limitations period of the special disability benefits provision of the Baltimore City Code, Maryland courts have interpreted various other provisions of the Code.[111] Because the Code is remedial in nature, the court generally borrows principles applied in similar aspects of workers' compensation law, which provide insight and background to its determinations.

In *Director of Finance for Baltimore v. Alford*,[112] the Court of Appeals interpreted a different element of the special disability benefits section of Article 22 to determine whether a claimant was entitled to recover special disability retirement benefits under the Baltimore City Code.[113] Alford, the claimant, suffered a permanent disability while traveling to report for duty under an emergency call from the police department.[114] The Court of Appeals considered whether his injury "arose 'out of and in the course of the actual performance of duty'" so as to legitimize his claim for special disability benefits.[115] Although it was well-established that traveling to and from work did not constitute conduct "[arising] out of and in the course of the actual performance of duty," the court borrowed an exception that grew out of the interpretation of the Workers' Compensation Act, referred to as the "going and coming" rule.[116] The court held that the claimant was responding to a call from his employer, to which he was expected to respond quickly, and that although he was not yet receiving pay, his injury "arose out of and in the course of employment."[117]

The court continues to borrow workers' compensation principles in other interpretations of the Baltimore City Code. In *Board of Trustees of the Employees' Retirement System v. Novik*,[118] the Court of Appeals interpreted Article 22, section 9(j) of the Code, which provides disability retirement benefits for employees who suffer an accident and

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111. *See, e.g.*, Bd. of Trs. v. Ches, 294 Md. 668, 670, 452 A.2d 422, 423 (1982) (interpreting Article 22, section 34(e) of the Code, and determining whether evidence of a police officer's alleged malingering tends to show that the police officer's disability is not the result of an injury arising out of and in the course of duty); Biscoe v. Balt. Police Dep't, 96 Md. App. 1, 20, 623 A.2d 666, 676 (1993) (interpreting Article 22, section 34(e)); Bd. of Trs. v. Kielczewski, 77 Md. App. 581, 592-93, 551 A.2d 485, 491 (1989) (holding that an applicant must prove a physical incapacity to be entitled to a special retirement benefit under Article 22, section 34(e) of the Code).

112. 270 Md. 355, 311 A.2d 412 (1973).

113. *Id.* at 359, 311 A.2d at 414.

114. *See id.* at 356-57, 311 A.2d at 413.

115. *Id.* (quoting Art. 22, § 34(e)).

116. *Id.* at 359-64, 311 A.2d at 414-17.

117. *Id.* at 364, 311 A.2d at 417.

118. 326 Md. 450, 605 A.2d 145 (1992).

subsequent injury while in the actual performance of a duty at a definite time and place.[119] In her petition, the claimant, Donna Novik, alleged that she had suffered an injury as a result of a slip and fall in a city-owned parking lot while walking to the building in which she worked.[120] In determining whether Novik suffered an accident while in the actual performance of a duty, the court looked to a similar provision in the Workers' Compensation Act.[121] The court concluded that the language of the city ordinance and the workers' compensation statute were "substantially legally equivalent."[122] Thus, the court applied the "going and coming rule," a rule commonly associated with the Workers' Compensation Act.[123] The court's application of the rule allowed Novik to recover because that rule provides that an employee who is accidentally injured on the employer's premises while going to or coming from work is considered to have been in the course of employment.[124] Thus, although there was no prior case law on the actual provision in question, the court borrowed a legal principal from the Act to aid in its interpretation of the Code.[125]

Maryland case law indicates that the court interprets remedial legislation broadly, but statutes of limitations narrowly. When the court interprets a new provision of the Code, it borrows the principles developed in workers' compensation law. Thus, the outcome of *Marsheck* reflects the court's narrow construction of a statute of limitations, even though it is part of a larger remedial scheme.

3. The Court's Reasoning.—In *Marsheck*, the Court of Appeals granted certiorari to determine whether the Court of Special Appeals erred in affirming the hearing examiner's denial of special disability benefits when he interpreted the date of Marsheck's "injury" to be the date of her original back injury.[126] The hearing examiner's interpretation of the term "injury" effectively precluded Marsheck from recovering special disability benefits under Article 22, section 34(e) of the

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119. *Id.* at 451, 605 A.2d at 145 (quoting Art. 22, § 9(j)). The accidental disability retirement benefit also contains a statute of limitations similar to the disputed provision in *Marsheck*. Art. 22, § 9(j) ("Any Class C member may file a claim within not more than 5 years of the date of an accident . . . .").

120. *Novik*, 326 Md. at 451-52, 605 A.2d at 145.

121. *Id.* at 455, 605 A.2d at 147.

122. *Id.* at 461, 605 A.2d at 150.

123. *Id.* at 453, 605 A.2d at 146.

124. *Id.*

125. *Id.* at 460-61, 605 A.2d at 150.

126. *See Marsheck*, 358 Md. at 398, 749 A.2d at 776.

Baltimore City Code because the provision contained a five-year statute of limitations.[127]

Marsheck argued that the court should adopt a liberal interpretation of "injury" in the remedial statute in order to effectuate its purpose.[128] More specifically, the plaintiff argued that the legislature must have intended "injury" to mean the date of permanent disability instead of the date of initial injury.[129] The FPERS argued for a more strict interpretation of "injury," relying on the long-standing rule that statutes of limitations are unambiguous and should be strictly construed to effectuate their purpose.[130]

The majority in *Marsheck* upheld the lower courts' decisions, finding that Marsheck's date of "injury" was the date of her initial back injury, which occurred more than five years before she filed her claim for special disability benefits.[131] The court adopted a strict interpretation of Marsheck's date of "injury" to uphold the statute of limitations enacted by the Baltimore City Council.[132]

The majority began its analysis by examining the relevant rules of statutory interpretation.[133] The court first recognized that "'[f]undamentally, the object of all statutory construction is to determine and effectuate the enactment's purpose.'"[134] The court followed this principle and limited its decision to answering whether the City Council had intended the term "injury" in section 34(e) of the Code to mean the point at which a police officer was injured or when the police officer became permanently disabled.[135]

In its attempt to determine legislative intent, the court recognized the statute's remedial nature and the fact that it contained a statute of limitations.[136] The court noted that because of its remedial nature, the statute should be "construed liberally in favor of injured employees in order to effectuate the legislation's remedial purpose."[137] The court then recognized the need for precaution because

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127. *Id.* at 400, 749 A.2d at 777. The provision was amended on June 27, 1979 to limit the right of compensation where the employee neglects to file his or her claim within five years of the date of injury. *Id.* at 410, 749 A.2d at 783.

128. *Id.*

129. *Id.* at 401, 749 A.2d at 778.

130. *Id.*

131. *Id.* at 413-14, 749 A.2d at 785.

132. *Id.*

133. *Id.* at 402-03, 749 A.2d at 779.

134. *Id.* at 402, 749 A.2d at 779 (quoting Briggs v. Maryland, 289 Md. 23, 421 A.2d 1369 (1980)).

135. *Id.*

136. *Id.* at 403, 749 A.2d at 779.

137. *Id.*

the remedial statute also contained a statute of limitations, to which "'[c]ourts should refuse to give . . . a strained construction to evade their effect.'"[138] The court, in extrapolating the City Council's intent, considered two conflicting canons of interpretation with two inherently different public policy justifications, both at the core of the parties' opposing arguments.[139]

The majority, relying on the reasoning set forth in *Montgomery County v. McDonald*,[140] noted that the very existence of a limitations provision indicates that the legislature has "'deliberately compromised the general compensation purpose in the interests of the purposes served by a limitations provision.'"[141] The majority then clearly stated the interests served by the limitation provision by outlining the public policy justifications behind the legislature's insertion of a statute of limitations.[142] The majority first noted that statutes of limitations serve important societal benefits, such as judicial economy.[143] The majority also recognized that statutes of limitations are designed to balance competing interests between adverse parties in the litigation process.[144] The court then explained that statutes of limitations protect potential defendants from problematic evidentiary issues, such as proof of the cause of injury, faded memories, and availability of witnesses that are likely to arise absent a statute of limitations.[145]

Next, the *Marsheck* court closely examined the provision and found several reasons supporting its conclusion that the legislature intended "injury" to mean the day on which Marsheck's accident occurred. First, the majority noted that the words "injury" and "disability" are not synonymous.[146] Therefore, the majority reasoned that if the two words were intended to mean the same thing, the legislature would have used the same word.[147] Second, the majority looked to

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138. *Id.* at 404, 749 A.2d at 780 (quoting McMahan v. Dorchester Fertilizer Co., 184 Md. 155, 159, 40 A.2d 313, 315-16 (1944)).

139. *Id.* at 403-04, 749 A.2d at 779-80.

140. 317 Md. 466, 564 A.2d 797 (1989); *see supra* notes 80-84 and accompanying text (discussing the reasoning in *McDonald*).

141. *Marsheck*, 358 Md. at 404, 749 A.2d at 779 (quoting *McDonald*, 317 Md. at 472, 564 A.2d at 800).

142. *Id.* at 404-05, 749 A.2d at 779-80.

143. *Id.* at 404, 749 A.2d at 779.

144. *Id.* at 405, 749 A.2d at 780.

145. *Id.* at 404-05, 749 A.2d at 780.

146. *Id.* at 408, 749 A.2d at 781-82.

147. *Id.* The majority explained in a footnote, "Nor are we convinced that § 34(e) was meant to state '[f]or any employee who became a member on or after July 1, 1979, any claim for special disability benefits must be filed within five (5) years of the date of the member's disability [or incapacitation].'" *Id.* at 409 n.6, 749 A.2d at 782 n.6.

the remedial purpose of awarding special disability benefits.[148] It noted that special disability benefits are designed to pay a higher amount to those permanently disabled if the injury "arose out of or in the course of employment."[149] A claimant under section 34(e) has the burden of proving that the injury arose out of, or in the course of, employment at an identifiable point in time.[150] The majority reasoned that if the legislature found that a discrete point in time is identifiable by the claimant, then it is that same point in time that triggers the statute of limitations.[151] Furthermore, the majority examined the history of the statute and reasoned that excepting the statute of limitations, in effect, would be "second-guessing and nullifying the City Council's apparent and legitimate policy objective to extinguish potential claims arising from work-related injuries after the five-year mark."[152]

Based on its examination of the statute, the court found that the legislature's intent was clear in two ways. First, it found that Marsheck's date of "injury" was clearly the date of her initial back injury and that the statute of limitations began to run on that date.[153] Secondly, it found that the statute of limitations was aimed to preclude *all* claims filed after the applicable deadline and was not to be modified "*ad hoc* to suit [the court's] sensibilities and pivot around the legislature's true intentions."[154] Accordingly, the court refused to make an exception to the five-year statute of limitations and affirmed the hearing examiner's decision that Marsheck was precluded from recovering special disability benefits.[155]

In dissent, Judge Eldridge adopted Marsheck's argument that the proper interpretation of "injury" should be the date at which she suffered permanent disability and argued that the majority's alternative interpretation was harsh and made no sense as a matter of public policy.[156] Judge Eldridge criticized the majority's interpretation, asserting that it violated the settled principle that courts should adopt " 'that

148. *Id.* at 409-10, 749 A.2d at 782.

149. *Id.*; *see supra* note 27 (explaining the difference between the two retirement benefits).

150. *Marsheck*, 358 Md. at 410, 749 A.2d at 783.

151. *Id.*

152. *Id.* at 411, 749 A.2d at 783.

153. *Id.* at 413-14, 749 A.2d at 785.

154. *Id.* at 414, 749 A.2d at 785.

155. *Id.*

156. *Id.* at 417, 749 A.2d at 786 (Eldridge, J., dissenting).

construction [of a statute] which avoids an illogical or unreasonable result.'"[157]

4. Analysis.—In *Marsheck*, the Court of Appeals held that the word "injury" in Article 22, section 34(e) of the Baltimore City Code, which grants special disability benefits to employees permanently injured on the job, should be interpreted as the date of a claimant's initial injury, instead of the date on which a claimant becomes permanently disabled.[158] Under the provision, the date of "injury" triggers the five-year statute of limitations.[159] As a result, the court denied Marsheck special disability benefits[160] and instead only awarded her ordinary disability benefits.[161]

Although the outcome in *Marsheck* was arguably harsh, the court's strict interpretation of the date of "injury" is proper for several reasons. First, the court's decision is consistent with Maryland precedent governing the proper interpretation of remedial statutes that also contain a statute of limitations. Consequently, the court's adherence to precedent effectuates the city council's clear intent behind inserting a statute of limitations. Second, the court's interpretation comports with its history of strong deference to the public policy justifications of statutes of limitations. Third, the court's decision provides hearing examiners and lower courts with an interpretation of the provision that will be easy to apply in future claims and will provide consistency in those outcomes.

a. The Court of Appeals's Decision Is Consistent with Precedent and Consequently Effectuates the City Council's Intent.—The *Marsheck* decision marks the court's first interpretation of the statute of limitations provision of Article 22, section 34(e) of the Baltimore City Code.[162] The court borrowed the appropriate legal principles from decisions in workers' compensation cases to determine the proper trigger for the five-year statute of limitations.[163] This application of workers' com-

157. *Id.* (quoting Kaczorowski v. City of Balt., 309 Md. 505, 513, 525 A.2d 628, 632 (1987)). Judge Eldridge quoted *Kaczorowski* to support his "settled principle," but *Kaczorowski* does not involve the court's interpretation of a statute of limitations, but instead the interpretation of a statute creating a bond agency. *See Kaczorowski*, 309 Md. at 507, 525 A.2d at 629.

158. *Marsheck*, 358 Md. at 413-14, 749 A.2d at 785.

159. Art. 22, § 34(e).

160. *Marsheck*, 358 Md. at 414, 749 A.2d at 785.

161. *Id.* at 400, 749 A.2d at 777.

162. *See id.* at 403, 749 A.2d at 779.

163. *Id.* The court immediately characterized the Code as "remedial" and recognized the caution necessary when interpreting a remedial scheme that also contains a statute of

pensation principles in interpreting the special disability benefits provision of the Code is consistent with precedent. For example, in *Director of Finance v. Alford*,[164] the court borrowed the "going and coming rule" that grew out of the interpretation of the Workers' Compensation Act, applying it to a similar provision of the Code.[165] Similarly, in *Board of Trustees v. Novik*,[166] the court analogized the applicable section of the Code to a similar provision in the Act, commenting that the provisions were so similar that there should be no legal distinction in their application.[167] Likewise, in *Marsheck*, the court relied on statutory interpretation principles related to statutes of limitations developed through workers' compensation case law in determining Marsheck's date of "injury."[168] Clearly, the court's reliance on workers' compensation principles is consistent with case law surrounding previously disputed provisions of the Code.

Although there was no case on point concerning the Code in *Marsheck*, *Montgomery County v. McDonald*[169] set forth a comparable principle in workers' compensation law. The *McDonald* court found that the very existence of a statute of limitations in the Workers' Compensation Act indicates that the legislature deliberately and unambiguously compromised the otherwise remedial nature of the statute.[170] Consistent with *McDonald*, the *Marsheck* court determined that the existence of the statute of limitations provision in section 34(e) of the Code indicated that the city council deliberately compromised the general compensation purpose of the retirement scheme and placed more importance on the purposes served by the statute of limitations.[171]

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limitations. *Id.* The court, in this recognition, referenced several cases interpreting the Workers' Compensation Act, such as *Martin v. Beverage Capital Corp.*, 353 Md. 399, 726 A.2d 728 (1999), and *Montgomery County v. McDonald*, 317 Md. 466, 564 A.2d 797 (1989). *Marsheck*, 358 Md. at 403, 749 A.2d at 779.

164. 270 Md. 355, 311 A.2d 412 (1973).

165. Dir. of Fin. for Balt. v. Alford, 270 Md. 355, 359, 311 A.2d 412, 414 (1973).

166. 326 Md. 450, 605 A.2d 145 (1992).

167. *Id.* at 461, 605 A.2d at 150; *see also supra* notes 118-125 (discussing *Novik* and the court's analogy of the two comparable principles).

168. *Marsheck*, 358 Md. at 403-04, 749 A.2d at 779.

169. 317 Md. 466, 564 A.2d 797 (1989).

170. *Id.* at 472, 564 A.2d at 800.

171. *Marsheck*, 358 Md. at 404, 749 A.2d at 779 (stating that "'[t]he general purpose of the applicable work[ers'] compensation act to compensate injured workers should not be used to interpret the limitations provision, because the very existence of a limitations provision in the act indicates that the legislature has deliberately compromised the general compensation purpose in the interests of the purposes served by a limitations provision.'" (quoting *McDonald*, 317 Md. at 471, 564 A.2d at 800)).

The court, possessing the discretion to interpret "injury," chose the meaning mandated by precedent.[172] The long-standing canon of statutory interpretation concerning remedial statutes is that they are to be "construed liberally in favor of the injured employees."[173] Case law, however, demonstrates that the court is likely to construe broadly a remedial statute by looking beyond its literal meaning only if it is ambiguous.[174] Case law concerning the Workers' Compensation Act indicates that the *Marsheck* court correctly determined that, in remedial schemes, statutes of limitations never are ambiguous and never should be given a strained construction.[175] Therefore, the court is not likely to make *ad hoc* determinations about the application of a statute of limitations, but instead will allow it to "function arbitrarily, without discrimination between the just and unjust claim."[176] The *Marsheck* court followed precedent and narrowly defined the date of Marsheck's "injury," denying her claim based on the five-year statute of limitations.[177] This narrow interpretation allowed the court to maintain its preference for predictable, objective, and bright-line rules that are easier for lower courts to follow and apply.

Although the outcome in *Marsheck* appears harsh, it is clear that the court will continue to abstain from creating exceptions to the statute of limitations to avoid such outcomes. As in *Vest v. Giant Food Stores, Inc.*,[178] in which the court dispensed with a claimant's objection that a strict application would result in a cruel outcome,[179] the *Marsheck* court correctly refused to make an exception in Marsheck's situation.[180] It is within the city council's discretion, not the court's, to determine appropriate windows of time for a claimant to recover ben-

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172. *Id.* at 408, 749 A.2d at 781-82.

173. *See McDonald*, 317 Md. at 472, 564 A.2d at 800.

174. *See, e.g., id.* (acknowledging that remedial statutes carry a liberal rule of construction, but refusing to disregard the provisions comprising the Act (citing Lockerman v. Prince George's County, 281 Md. 195, 202 n.5, 377 A.2d 1177, 1182 n.5 (1977) (explaining that the court is "not at liberty to disregard [the Act's] *clear* meaning" (emphasis added)))); Briggs v. State, 289 Md. 23, 31, 421 A.2d 1369, 1374 (1980) ("Thus, only when the statutory language is unclear or ambiguous will we look to other sources to guide us in our search for its meaning.").

175. *See supra* text accompanying notes 74-110 (citing various cases in which the Court of Appeals consistently upheld statutes of limitations in workers' compensation cases, refusing to give a strained construction where the legislature's intent is clear).

176. Johns Hopkins Hosp. v. Lehninger, 48 Md. App. 549, 562, 429 A.2d 538, 545 (1981).

177. *Marsheck*, 358 Md. at 413-14, 749 A.2d at 785.

178. 91 Md. App. 570, 605 A.2d 627 (1992).

179. Vest v. Giant Food Stores, Inc., 91 Md. App. 570, 587, 605 A.2d 627, 636 (1992).

180. *Marsheck*, 358 Md. at 414, 749 A.2d at 785.

efits. Thus, the *Marsheck* decision is consistent with precedent and effectuates the city council's intent in inserting the statute of limitations.

b. The Court's Interpretation Comports with Its History of Deference to the Public Policy Justifications of Statutes of Limitations.—The *Marsheck* decision also conveys the court's belief in, and deference to, the public policy justifications behind statutes of limitations. The legislature, in creating statutes of limitations, prescribes time limits for the assertion of rights and deprives claimants of the opportunity to litigate an otherwise valid claim after a certain amount of time has elapsed.[181] The Court of Appeals gives great deference to the legislature's intent with regard to statutes of limitations, reasoning that it is within the power of only the legislature to make exceptions to limitations periods.[182] The court presumes that the legislature's intent in enacting statutes of limitations is clear in that such statutes "reflect legislative judgment of what is an adequate time for a person of ordinary diligence to bring an action."[183] The *Marsheck* decision demonstrates that the court has adopted an absolute acceptance of statutes of limitations; the court will not except or liberally construe them absent legislative guidance.[184]

The Court of Appeals has held unequivocally that absent a legislative creation of an exception to the statute of limitations, it will not allow any "'implied and equitable exception to be engrafted upon it.'"[185] The court has justified its position, which sometimes results in harsh outcomes, by invoking the public policy justifications of consistency and predictability, as well as the preservation of an effective ad-

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181. *See Developments in the Law—Statutes of Limitations* [hereinafter *Developments in the Law*], 63 HARV. L. REV. 1177, 1185 (1950).

182. *See, e.g.*, McMahan v. Dorcester Fertilizer Co., 184 Md. 155, 160, 40 A.2d 313, 316 (1944) (refusing to make an exception to the applicable statute of limitations and stating, "[i]t would be going far for this court to add those exceptions. If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not contain").

183. Hecht v. Resolution Trust Corp., 333 Md. 324, 332, 635 A.2d 394, 398-99 (1994).

184. *Marsheck*, 358 Md. at 414, 749 A.2d at 785 ("We will not modify the disability system *ad hoc* to suit our sensibilities and pivot around the legislature's two intentions."); *see, e.g.*, DeBusk v. Johns Hopkins Hosp., 342 Md. 432, 439, 677 A.2d 73, 76 (1996) (refusing to make an exception to the two-year statute of limitations, and explaining that, by their very nature, "such rules and standards cannot make exceptions for every scenario [that] might arise."); Montgomery County v. McDonald, 317 Md. 466, 472, 564 A.2d 797, 800 (1989) (refusing to toll the statutes of limitations and stating that "[w]e cannot add a purportedly intended, but omitted, tolling provision to § 26(b) through the process of statutory construction").

185. *Hecht*, 333 Md. at 333, 635 A.2d at 399 (quoting Booth Glass Co. v. Huntingfield Corp., 304 Md. 615, 623, 500 A.2d 641, 645 (1985)).

versarial system.[186] The *Marsheck* court relied on these two commonly recited public policy considerations to justify adhering to this precedent, even though it precluded an arguably deserving claimant from receiving special disability benefits.[187]

(1) Predictability of Outcomes.—The majority in *Marsheck* offered the predictability inherent in applying bright-line rules as one of its justifications for upholding the statute of limitations.[188] The *Marsheck* court reasoned that objective standards and bright-line rules, such as the statute of limitations provision in the Code, are the very keys to predictability, in the sense that "'everyone is treated in the same manner and everyone knows or can discover the rules in advance of their application.'"[189] The justification is only proper, however, if the bright-line rule adopted by the court actually serves its intended purpose, ensuring predictability.

This justification is proper in the *Marsheck* decision because, if the court created an *ad hoc* exception for situations such as Marsheck's, the exceptions would swallow the rule and would negate the predictability of the statute.[190] Furthermore, the city council would have the impossible task of anticipating all applications of the statute and every exception that might arise. If the court were allowed to exercise the discretion that only the legislature holds in creating exceptions, it would lead to inconsistent results—the antithesis of predictability.[191] Moreover, judicially created exceptions would subject the rule to manipulation in the courtroom and to the unfettered discretion of hearing examiners.[192]

The *Marsheck* court relied heavily on the predictability justification asserted in *DeBusk v. Johns Hopkins Hospital.*[193] Like *Marsheck*, the *DeBusk* court applied a bright-line rule to determine when the limitations period was triggered.[194] The *DeBusk* court characterized this application as a "classic example of an objective, bright-line rule which fosters predictable outcomes in otherwise unpredictable situa-

186. *See, e.g., DeBusk*, 342 Md. at 439, 677 A.2d at 76.

187. *Marsheck*, 358 Md. at 413, 749 A.2d at 784 ("[S]tatutes of limitations re-enforce predictability, which is a cornerstone of such benefit statutes.").

188. *Id.*

189. *Id.* (quoting *DeBusk*, 342 Md. at 439, 677 A.2d at 76).

190. *Id.*

191. The *Marsheck* court recognized that its decision "excluded her from a disability benefit that she might very well deserve in an unregulated universe," but refused to "pivot around the legislature's true intentions." *Id.* at 414, 749 A.2d at 785.

192. *Id.*; *see also DeBusk*, 342 Md. at 438-39, 677 A.2d at 76.

193. 342 Md. 432, 439, 677 A.2d 73, 76.

194. *Id.*

tions."[195] Similarly, the majority in *Marsheck* also applied a bright-line rule to ensure predictability by strictly adhering to the statute of limitations, regardless of the fact that this steadfast application precluded Marsheck from recovery.[196]

The court's adoption of the objective, bright-line rule in applying statutes of limitations clarifies the special disabilities statute and ensures predictability for future claims. The court's interpretation—that the statute of limitations is triggered for special disability benefits at the onset of the initial injury—will not be easily manipulated by claimants and will reduce the costs of litigating invalid claims. The *Marsheck* decision clarifies that the point of the initial injury triggers the five-year statute of limitations.[197] After *Marsheck*, an injured employee and potential claimant is on notice that he has five years to advance his claim for permanent disability, or he risks losing his opportunity to recover.[198] By clarifying the date from which the statute of limitations begins to run, the *Marsheck* decision ensures objective results and predictability in future cases.

The preclusion of a claim based on the statute of limitations defense does not convey a court's determination of the merits of that claim. Instead, the purpose of the insertion of a statute of limitations is to extinguish the remedial right and not the underlying claim.[199] In other words, the city council's decision to restrict the remedial right to special disability benefits after five years does not invalidate the underlying right that a claimant may have to the benefit.[200]

In strictly applying the five-year statute of limitations, the *Marsheck* court conceded that permanent disability may occur after the five-year limitations period, thereby excluding deserving claimants.[201] The court acknowledged, however, that it did not have the requisite power or discretion to modify the legislatively created retirement system.[202]

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195. *Id.*

196. *See Marsheck*, 358 Md. at 414, 749 A.2d at 785; *DeBusk*, 342 Md. at 448, 677 A.2d at 81.

197. *Marsheck*, 358 Md. at 413-14, 749 A.2d at 785.

198. *Id.* (holding that the initial injury triggers the limitations period).

199. *See Developments in the Law*, *supra* note 181, at 1186-87 ("[A] limitation extinguishes the remedial action but not the underlying right, which still may serve as a basis for remedies other than such direct action."); *see also* Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1868) (explaining that statutes of limitations "are enacted to restrict the period within which the right, otherwise unlimited, might be asserted").

200. In fact, the *Marsheck* court noted that its strict application may have excluded her from a benefit that "she might very well deserve in an unregulated universe." *Marsheck*, 358 Md. at 414, 749 A.2d at 785.

201. *Id.*

202. *Id.*; *see* Art. 22, § 2.

The court's adherence to the city council's intent conveys its deference to both the city council and the legislative process. The city council possesses the sole ability to draft and enact legislation.[203] Its choice to implement a retirement system that differentiates between the employee who suffers permanent disability in the line of duty and the employee who simply suffers permanent disability[204] is not subject to modification. The fact that only the special disabilities provision contains a statute of limitations conveys the city council's intent to differentiate between ordinary and special disability benefits.[205] The city council imposed a greater burden of proof on the retiree under the special disability benefits section because the benefit is substantially greater.[206] The intent of inserting the statute of limitations in the special disability provision is clear—the objective, bright-line rule encourages claimants to investigate their rights and to pursue them promptly, or lose them at the five-year mark.

(2) The Balancing of Competing Interests.—The majority in *Marsheck* offered the assurance of the balancing of interests between potentially adverse parties as a second justification for upholding the statute of limitations.[207] Where a cause of action offers an employee a window of opportunity to make a claim, the statute of limitations prevents unfairness to the defendant by closing the window at some identifiable point.[208] The city council's rationale in inserting the statute of limitations was to protect the retirement system from having to defend claims when the lapse of time may have caused evidence to be lost, memories to fade, or important witnesses to disappear, thereby preserving the balance of the adversarial process.[209]

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203. Art. 22, §§ 1-3.

204. *Compare id.* § 34(c), *with id.* § 34(e).

205. *See supra* notes 10 & 27 (respectively, explaining the difference in the burden of proof to receive and the benefit conferred between the two types of benefits available under the Retirement System).

206. *Marsheck*, 358 Md. at 410, 749 A.2d at 783.

207. *Id.* at 404, 749 A.2d at 779-80.

208. *See Developments in the Law, supra* note 181, at 1185 (explaining that there should be a time where the defendant "ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations"); *see also* Eli J. Richardson, *Eliminating the Limitation of Limitations Law*, 29 ARIZ. ST. L.J. 1015, 1025-26 (1997) (noting that one of the objectives of limitations law is to protect defendants from the difficulty of defending against stale claims, and that such protection is generally viewed as a simple matter of fairness to the defendant).

209. As time lapses in any situation, it becomes increasingly more difficult for a defendant to put on an effective defense. *See generally* John G. Petrovich, Comment, *The Recovery of Stolen Art: Of Paintings, Statues and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1126-28 (1980) (identifying a rationale behind statutes of limitations as the realization that the

Arguably at the forefront of its analysis, the court deferred to another justification for the statutes of limitations: providing peace of mind to the retirement system by freeing it from the uncertainty of outstanding claims and the disadvantage of attempting to defend against stale claims.[210] The court gave great deference to the fact that the city council enacted the statute of limitations to protect the retirement system from situations where it is nearly impossible to defend claims due to a long lapse of time between the initial injury and the claim.[211]

The majority in *Marsheck* conceded that strict adherence to the statute of limitations may, in some circumstances, result in "excluding [claimants] from a disability benefit that [they] might very well deserve in an unregulated universe."[212] In a sound policy decision, however, the majority in *Marsheck* gave greater deference to the defendant's need for protection by strictly adhering to unforgiving statutes. The court's enforcement of the statute of limitations strikes a balance between the interests of the claimant and those of the retirement system. The special disability benefits provision grants a remedial right to an employee who suffers a permanent disability on the job, but the statute of limitations restricts that right when it is no longer fair for the retirement system to have to defend the claim.

c. Marsheck Leaves Hearing Examiners and the Lower Courts with an Easy-to-Apply Interpretation That Clarifies the Provision for Future Claims.—The court's decision in *Marsheck* reiterates the principle that the court will continue to follow precedent and uphold statutes of limitations, no matter how harsh the outcome, until the legislature instructs otherwise. The *Marsheck* decision relieves hearing examiners and lower courts of the burden of analyzing stale facts, such as when a person suffered permanent disability,[213] and creates consistency in the

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passage of time gives rise to certain factors and conditions which make litigation of a claim unduly troublesome or unfair).

210. *See Marsheck*, 358 Md. at 405, 749 A.2d at 780.

211. Although the majority does not clearly set forth this point, it is inherent in its analysis. In determining the date of injury, the majority states, "[i]f we accepted Petitioner's argument . . . we essentially would be second-guessing and nullifying the City Council's apparent and legitimate policy objective to extinguish potential claims arising from work-related injuries after the five year mark." *Id.* at 411, 749 A.2d at 783.

212. *Id.* at 414, 749 A.2d at 785.

213. Marsheck's argument for when the section 34(e) statute of limitations should be triggered would arguably leave a hearing examiner with this task. *See id.* at 400-01, 749 A.2d at 777-78. Marsheck asked the court to equate "injury" with the date on which she became permanently disabled, but offered no externally verifiable date as to when precisely that occurred. *Id.*

distribution of special disability retirement benefits under the Baltimore City Code.[214] *Marsheck* leaves hearing examiners with an easy to apply standard and clarifies the court's role in interpreting the Code.[215] A hearing examiner makes the final administrative decision as to an employee's eligibility for special disability retirement.[216] The *Marsheck* decision minimizes the potential for unreliable fact-finding by removing the hearing examiner's case-by-case assessment of the subjective knowledge of a person and of the "injury" trigger date. The standard set out in *Marsheck* leaves no discretion to the hearing examiner and preempts *ad hoc* decisionmaking by the lower court, thus reducing costs and time spent adjudicating claims that clearly are precluded by the five-year statute of limitations.

5. Conclusion.—The Court of Appeals is charged with carrying out the intent of the legislature in the review of statutes. *Marsheck*'s strict adherence to the statute of limitations and refusal to make an exception without the clear permission of the legislature allows the court to effectuate the intent of the Baltimore City Council and effectively bar stale claims. *Marsheck* represents a perfect example of sacrificing one unusual case for the broader goal of providing predictability and consistency to the retirement system of Baltimore City.

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214. *See Developments in the Law, supra* note 181, at 1186 (asserting that limitations on private actions against the sovereign serve the purpose not so much of fairness as of public convenience).

215. *See id.* (remarking that "a workable Statute of Frauds, strict rules of evidence, and trained triers of fact may be more effective safeguards against the dangers of stale evidence than are arbitrarily fixed time periods").

216. *See* Biscoe v. Balt. City Police Dep't, 96 Md. App. 1, 5, 623 A.2d 666, 668-69 (1993).

VIII. EVIDENCE

A. *Rethinking the Missing Evidence Due Process Analysis: A Departure from Precedent and a Weakening of Criminal Defendants' Due Process Rights*

In *Patterson v. State*,[1] the Court of Appeals held that a trial judge is not required to give a missing evidence instruction to the jury when requested to do so by a criminal defendant.[2] The court further held that there was no denial of due process when the defendant could not show that the State was acting in bad faith when it failed to produce the missing evidence.[3] The court reached this conclusion by adopting the bad faith requirement enunciated by the United States Supreme Court in *Arizona v. Youngblood*[4] and by relying on a line of Maryland cases which hold that closing argument, rather than an instruction, is the appropriate form for presenting to the jury any inferences that might be drawn from the missing evidence.[5] In adopting the bad faith requirement of *Youngblood*, the Court of Appeals increased the already heavy burden on criminal defendants and rejected the fairness model of the criminal trial in favor of the pure adversarial model.

1. The Case.—On April 16, 1996, two officers of the Montgomery County Police Department stopped Andre Patterson after observing him run a stop sign in a Buick that bore temporary District of Columbia license plates.[6] Although Patterson had in his possession a valid District of Columbia driver's license, the officers placed him under arrest after they ran a records check through the Maryland Motor Vehicle Administration and discovered that he had been driving with a revoked Maryland driver's license.[7] After Patterson was placed in the

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1. 356 Md. 677, 741 A.2d 1119 (1999).

2. *Id.* at 688, 741 A.2d at 1124-25. A missing evidence instruction would have informed the jury that due to the State's omission, the jury may infer that the evidence would have been unfavorable to the State. *Id.*, 741 A.2d at 1124. The instruction would only suggest the availability of the inference; it would not require that the jury give the inference any more weight than other inferences. *Id.*; *see infra* note 14 (providing the full text of the requested instruction).

3. *Patterson*, 356 Md. at 696, 741 A.2d at 1128-29.

4. 488 U.S. 51, 57-58 (1988).

5. *See, e.g.*, Davis v. State, 333 Md. 27, 49, 633 A.2d 867, 878 (1993) (holding that the trial judge did not err in permitting the State to make a missing witness argument); Bailey v. State, 63 Md. App. 594, 610, 493 A.2d 396, 404 (1984) (holding that a court is never required to issue a missing evidence instruction and that the propriety of issuing such an instruction is best left to the discretion of the trial judge); Yuen v. State, 43 Md. App. 109, 118-19, 403 A.2d 819, 826 (1979) (holding that the trial court did not abuse its discretion by denying defendant the requested missing witness jury instruction).

6. *Patterson*, 356 Md. at 681, 741 A.2d at 1121.

7. *Id.*

police car, one of the officers conducted an inventory search of the Buick.[8] In a jacket pocket found in the trunk of the Buick, the officer discovered thirty one-inch by one-inch Ziploc baggies, each of which contained what was suspected, and later proven, to be a rock of crack cocaine.[9]

During Patterson's trial, the prosecution offered into evidence a photograph of the jacket while it was still in the trunk of the car, rather than a photograph of the jacket itself.[10] Upon cross-examination of the two police officers, the defense was able to show that the jacket was never seized by the police, that neither officer was aware of the current location of the jacket, and that it was not standard procedure to hold evidence such as the jacket.[11] Patterson argued that the jacket did not belong to him, and that had the jacket been produced as evidence, he would have tried it on to show that it did not fit, proving that it was not his property.[12] No evidence was presented that showed whether the State knew that Patterson owned the jacket, that he intended to assert that the jacket was not his, or that the jacket did not fit him.[13] At the close of trial, Patterson "requested that the court issue a missing evidence instruction allowing the jury to infer that, because the State could not produce the jacket, its admission into evidence would have been unfavorable to the State."[14]

The trial court denied the requested instruction, and Patterson was convicted of possession of cocaine with intent to distribute, as well as various driving offenses.[15] The Court of Special Appeals affirmed on the basis that the trial judge did not erroneously deny the missing evidence instruction.[16]

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8. *Id.*

9. *Id.* The police seized a total of 4.93 grams of cocaine. *Id.*

10. *Id.*

11. *Id.* at 681-82, 741 A.2d at 1121.

12. *Id.* at 682, 741 A.2d at 1121.

13. *Id.*

14. *Id.* The requested instruction read as follows:

> You have heard testimony that a piece of evidence in this case, a coat, was not produced at trial by the State. If a piece of evidence could have provided important information in this case and if the evidence was peculiarly within the power of the State to produce, but was not produced by the State and the absence of that evidence was not sufficiently accounted for or explained, then you may decide that the evidence would have been unfavorable to the State.

Id.

15. *Id.* at 680, 741 A.2d at 1120.

16. *Id.*

The Court of Appeals granted certiorari to consider whether the trial court erred in refusing to give the instruction and whether, as a result of this refusal, Patterson was denied due process of law.[17]

2. Legal Background.—The bad faith test for granting a missing evidence jury instruction as articulated by the Supreme Court in *Arizona v. Youngblood*,[18] and adopted by the Court of Appeals of Maryland in *Patterson*, came after thirty-six years of developments in the area of "constitutionally guaranteed access to evidence."[19] Beginning with the Supreme Court's decision in *Brady v. Maryland*,[20] the Court handed down a series of cases which impose an affirmative duty on the State to disclose exculpatory evidence to the defendant.[21] These cases established the State's duty with respect to possession of actual evidence, whereas in *Youngblood*, the Court addressed situations in which the State no longer had the evidence at the time of trial.[22] Despite this difference between *Brady* and *Youngblood*, each of these cases considered the role the State must play in protecting the due process rights of defendants.[23]

The bad faith test for the missing evidence jury instruction in *Patterson* resulted from three sources of earlier case law: (a) the evolving duty of the State regarding evidence that potentially favors defendants;[24] (b) the treatment of missing evidence in the Supreme Court

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17. *Id.* at 681, 741 A.2d at 1120.

18. 488 U.S. 51 (1988).

19. United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (relying on the materiality requirement as stated in *Brady* and developed in *Agurs*).

20. 373 U.S. 83, 87 (1963) (holding that the suppression of evidence by the State violates the due process rights of criminal defendants when the evidence is material either to guilt or punishment).

21. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that evidence is material when there is a reasonable probability that, had the evidence been turned over to the defense, the result of the trial would have been different); United States v. Agurs, 427 U.S. 97, 113-14 (1976) (holding that a defendant's due process rights are violated when evidence which would have created a reasonable doubt as to the defendant's guilt is suppressed).

22. *Compare Brady*, 373 U.S. at 87 (limiting the holding to evidence suppressed by the prosecution), *with Youngblood*, 488 U.S. at 57 (noting that missing evidence is fundamentally different from suppressed evidence and requires a different analysis).

23. The *Youngblood* Court distinguished those cases concerning evidence actually in the State's possession and established different standards for cases where the evidence is no longer in the State's possession. *Youngblood*, 488 U.S. at 57. The Court also asserted that "[t]here is no question but that the State complied with *Brady* and *Agurs*." *Id.* at 55.

24. *See Brady*, 373 U.S. at 87-88 (discussing the role of the prosecutor in conducting a criminal trial that is fundamentally fair). The Court in *Youngblood*, and accordingly in *Patterson*, stated that the bad faith case law comports with existing case law under *Brady*. *See Youngblood*, 488 U.S. at 55, 58 (asserting that the holding is in accord with earlier *Brady* cases, and using *California v. Trombetta*, 467 U.S. 479 (1983), as a basis for its holding); *see*

and in Maryland courts;[25] and (c) consideration of the historically favored form of the evidentiary inference in Maryland.[26]

a. The Evolving Duty of the State.—The State historically shoulders the burden of proof in criminal trials.[27] This burden, as construed in *Brady*, imposes upon the State the responsibility for disclosing exculpatory evidence to defendants.[28] The evolution of the doctrine of constitutionally guaranteed access to evidence, beginning with *Brady*, establishes the context for understanding the bad faith requirement adopted in *Patterson*.

(1) The State's Burden of Proof.—In a criminal trial, the defendant is presumed innocent until proven guilty, and it is the State that bears the burden of proof.[29] The State bears not only the burden of producing evidence sufficient to convince a jury that the defendant is guilty beyond a reasonable doubt,[30] but also the duty to ensure that the evidence presented is full and complete.[31] An incomplete presen-

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also infra notes 35-49 and accompanying text (discussing generally the evolution of the *Brady* test).

25. *See Youngblood*, 488 U.S. at 57-58 (arguing that missing evidence requires the bad faith test instead of the *Brady* test); *Trombetta*, 467 U.S. at 488-89 (analyzing missing evidence pursuant to the *Brady* test with a bad faith element); Eley v. State, 288 Md. 548, 555, 419 A.2d 384, 388 (1980) (holding that when stronger evidence is available, but the State relies on weaker evidence, the defendant is entitled to comment on this lack of production); Bailey v. State, 63 Md. App. 594, 610-11, 493 A.2d 396, 404 (1985) (finding that missing evidence, if cumulative to the evidence already provided, does not prejudice the defendant).

26. *See, e.g.*, Davis v. State, 333 Md. 27, 34, 633 A.2d 867, 870 (1993) (holding that the evidentiary inference is the appropriate remedy for missing evidence cases); State v. Werkheiser, 299 Md. 529, 538, 474 A.2d 898, 903 (1984) (observing that an inference is favored over other remedies). Maryland courts recognize two forms for the evidentiary inference—closing argument and the jury instruction—but in missing evidence cases, the courts strongly disfavor the jury instruction. *See Patterson*, 356 Md. at 688, 741 A.2d at 1124 (noting that the historical trend followed by Maryland law in missing evidence cases has been to allow the evidentiary inference in closing argument); *Davis*, 333 Md. at 52, 633 A.2d at 879 (observing that closing argument is the more appropriate form of the inference than jury instruction); *Bailey*, 63 Md. App. at 611, 493 A.2d at 404 (noting that no Maryland court has ever held that a defendant is entitled to a missing evidence instruction).

27. *See* Eley v. State, 288 Md. 548, 553, 419 A.2d 384, 387 (1980).

28. Brady v. Maryland, 373 U.S. 83, 87 (1963).

29. *See* 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.8 (1986) (discussing the policy that the prosecution bears the burden of proof in a criminal trial).

30. *See Brady*, 373 U.S. at 87 (explaining that the role of the prosecutor is to ensure that criminal trials are fair); *Eley*, 288 Md. at 553, 419 A.2d at 386-87 (finding that it is the State that generally has the burden of bringing forth evidence to prove its case).

31. *See Brady*, 373 U.S. at 87-88 (noting that the defendant bears a heavy burden when the prosecution withholds potentially exculpatory evidence); *Eley*, 288 Md. at 553, 419 A.2d

tation of material evidence to the jury renders any trial unfair and any verdict tainted.[32] In correlation with the prosecution's duty to advocate on behalf of the State and provide evidence to the defense is the defendant's specific constitutional right not to testify and judicially developed right not to present evidence.[33] The seemingly inconsistent duties of the prosecution reflect the dual functions of the State to contend in an adversarial proceeding and also to ensure that justice is served by providing a fair trial.[34]

(2) A History of the State's Duty to Produce Evidence.—The missing evidence doctrine is rooted in the Supreme Court's treatment of the Due Process Clause of the Fourteenth Amendment.[35] Beginning with *Brady*, the Supreme Court has interpreted the Due Process Clause as constitutionally guaranteeing criminal defendants varying degrees of access to different types of evidence.[36] *Brady* held that the

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at 387 (stating that defense counsel could comment on the prosecution's lack of evidence).

32. *See* United States v. Agurs, 427 U.S. 97, 112 (1975) (finding that when material evidence is omitted from a criminal trial, constitutional error results); Mooney v. Holohan, 294 U.S. 103, 112 (1934) (asserting that the presentation of inaccurate or incomplete testimony is inconsistent with the demands of justice). *See generally* Dale A. Nance, *Evidential Completeness and the Burden of Proof*, 49 HASTINGS L.J. 621 (1998) (arguing that the burden of proof requires that a judgment be based on a complete evidentiary package).

33. *See Eley*, 288 Md. at 554, 419 A.2d at 387 (explaining that the defendant does not need to offer anything in his defense to be presumed innocent—the State must prove his guilt). It is permissible for the defendant to comment on the State's lack of evidence, because the State affirmatively carries the burden of production. However, it is not permissible for the State to comment on the defendant's lack of evidence, because it would then be impermissibly shifting the burden of production to the defendant. *See Eley*, 288 Md. at 555-56 n.2, 419 A.2d at 388 n.2.

34. *See* United States v. Bagley, 473 U.S. 667, 696 (1985) (Marshall, J., dissenting). Justice Marshall articulated the prosecutor's dual role:

> The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth.

Id.

35. *See Brady*, 373 U.S. at 86 (stating that suppression of material evidence violates the Due Process Clause). The Due Process Clause states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. 14, § 1.

36. Constitutionally guaranteed access to evidence includes impeachment evidence and testimony by witnesses. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (holding that the deportation of potential witnesses for the defense impairs the ability to mount an effective defense); Mooney v. Holohan, 294 U.S. 103, 112-13 (1934) (finding that perjured testimony offered against a criminal defendant violates the defen-

"suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[37] *Brady*'s progeny further developed the area of constitutionally guaranteed access to evidence by clarifying the circumstances under which the prosecution has a duty to disclose exculpatory evidence to the defendant.[38] The Court in *United States v. Agurs*[39] drew on its earlier holding in *Brady* to assert that evidence is material when there is a reasonable probability that had the evidence been produced, the fact-finder would have had a reasonable doubt as to guilt.[40] Several years later, *Strickland v. Washington*[41] clarified "reasonable probability" by defining it as "a probability sufficient to undermine confidence in the outcome."[42]

These cases stand for the proposition that an unconstitutional violation of due process occurs when the State suppresses evidence which: (1) is favorable to the accused, either because it is exculpatory or impeaching;[43] (2) was suppressed either willfully or inadvertently;[44] and (3) results in prejudice to the defendant.[45] The touchstone of

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dant's due process rights). This area also includes the traditional *Brady* situations: (1) suppressed evidence that demonstrates that the State's case included perjured testimony; (2) specific evidence requested prior to trial, but suppressed by the prosecution; and (3) a general request for all material evidence made prior to trial, but not responded to by the prosecution. *Agurs*, 427 U.S. at 103-06.

37. *Brady*, 373 U.S. at 87; *see also* Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (reciting the *Brady* materiality test).

38. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281 (1999) (noting that a *Brady* violation does not occur unless the prosecutorial nondisclosure created a "reasonable probability that the suppressed evidence would have produced a different verdict"); Kyles v. Whitley, 514 U.S. 419, 438 (1995) (asserting that the prosecutor has the responsibility of disclosing "known, favorable evidence rising to a material level of importance"); *Bagley*, 473 U.S. at 682 (holding that the correct standard of materiality requiring disclosure is whether there is a reasonable probability that, had the evidence been turned over to the defense, the result of the trial would have been different); Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that the proper standard for determining the materiality of evidence is whether there is a reasonable probability that, had the prosecution provided the evidence, the result of the proceeding would have been different); *Agurs*, 427 U.S. at 112 (holding that there is no due process violation when evidence is suppressed, unless the suppressed evidence would have created a reasonable doubt as to the defendant's guilt).

39. 427 U.S. 97 (1976).

40. *Id.* at 112.

41. 466 U.S. 668 (1984).

42. *Id.* at 694.

43. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

44. *See id.* (noting that whether the evidence was suppressed out of good or bad faith is immaterial to the analysis).

45. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995) (discussing the appropriate standard for assessing the prejudice component of the *Brady* test).

the test is whether, in the absence of the evidence, the defendant received a fair trial.[46]

The Supreme Court has applied a stricter test to cases where the evidence is "missing," as compared to cases where the evidence is withheld, as was the case in *Brady*.[47] The *Brady* test requires that the withheld evidence be both favorable to an accused and material either to guilt or to punishment.[48] In the case of missing evidence, the Supreme Court has found that neither of these prerequisites can be met when the exact content of the evidence is unknown, and, therefore, the missing evidence cases require a different analysis.[49]

b. Missing Evidence Before and After Arizona v. Youngblood.—In *Youngblood*, the Supreme Court relied on *California v. Trombetta*[50] to exempt missing evidence from the general category of constitutionally guaranteed access to evidence cases covered by the *Brady* test.[51] The Court did not consider the variations in treatment of different types of missing evidence, as Maryland does, presuming instead to treat all categories identically.

(1) The Foundation for Youngblood*'s Departure*—California v. Trombetta.—The Court in *Trombetta* paired the *Brady* materiality analysis with a bad faith inquiry to determine whether the State's failure to preserve potentially exculpatory breath samples violated the defendants' due process rights.[52] The Court began by noting that generally the State's duty to preserve evidence is different from the State's duty to disclose available evidence under the *Brady* test.[53] In *Trombetta*, the defendants were charged with driving while intoxicated, and the State relied on incriminating intoxilyzer results taken at the time of their arrests.[54] Once the tests were taken, the samples were destroyed as a matter of routine procedure.[55] The defendants sought to suppress

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46. *See id.* at 439-40 (advising that the adversary system is not intended to be a "gladitorial" contest, but a search for the truth).

47. *See* Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (suggesting that missing evidence cases are inherently different from suppressed evidence cases); California v. Trombetta, 467 U.S. 479, 488 (1984) (applying the bad faith analysis to a missing evidence case).

48. *Brady*, 373 U.S. at 87.

49. *See Youngblood*, 488 U.S. at 57-58.

50. 467 U.S. 479 (1984).

51. *See Youngblood*, 488 U.S. at 56-57.

52. *Trombetta*, 467 U.S. at 488.

53. *Id.* at 481.

54. *Id.* at 482.

55. *Id.* at 482-83.

the test results, arguing that had the breath samples been preserved, they would have been able to use them to impeach the results.[56]

The California Court of Appeals ruled in favor of the defendants, holding that "'[d]ue process demands simply that where evidence is collected by the state, as it is with the intoxilyzer . . . law enforcement agencies must establish and follow systematic and rigorous procedures to preserve the captured evidence or its equivalent for the use of the defendant.'"[57]

The Supreme Court reversed the California court's holding.[58] Admitting that it had "never squarely addressed the government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants," the Court analyzed the State's failure to preserve evidence under the *Brady* rubric.[59] The Court noted that the failure to preserve the breath samples was "in good faith and in accord with . . . normal practice."[60] The Court then analyzed the State's actions under the *Brady* test to conclude that the "Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial."[61]

(2) The Youngblood *Bad Faith Test.*—In *Youngblood*, the Supreme Court granted certiorari "to consider the extent to which the Due Process Clause requires the State to preserve evidentiary material that may be useful to a criminal defendant."[62] By holding that the State cannot be held responsible for lost or destroyed evidence unless the defendant can show that the State acted in bad faith, the Supreme Court decreased the burden of production on the State.[63]

The Arizona Court of Appeals reversed Youngblood's conviction of child molestation, sexual assault, and kidnapping on the basis that the State had failed to preserve semen samples from the victim's body and clothing.[64] Youngblood was identified as the assailant only

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56. *Id.* at 483.

57. *Id.* at 483-85 (quoting People v. Trombetta, 190 Cal. Rptr. 319, 320-21 (Cal. Ct. App. 1983)).

58. *Id.* at 484.

59. *Id.* at 486, 488.

60. *Id.*

61. *Id.* at 489-90.

62. Arizona v. Youngblood, 488 U.S. 51, 52 (1988).

63. *Id.* at 58 (explaining that one of the reasons that the Court adopted the bad faith test was to lessen the State's burden of preserving evidence).

64. Arizona v. Youngblood, 734 P.2d 592, 592 (Ariz. Ct. App. 1986); *see Youngblood*, 488 U.S. at 52, 54.

through a photographic line-up identification by the victim.[65] He then disputed this identification, arguing that had the police taken proper procedural measures, such as preserving the semen and saliva gathered from the "sexual assault kit" and the victim's clothing, such measures could have exonerated him by showing that he was not the assailant.[66] The trial court instructed the jury that if they found that the State had destroyed or lost the evidence, they might "infer that the true fact is against the State's interest."[67] Although the jury convicted him, the Arizona Court of Appeals reversed the conviction, reasoning that "'when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.'"[68]

After granting certiorari, the Supreme Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[69] In reaching this conclusion, the Court acknowledged the irrelevance of good or bad faith in *Brady*, but noted that the failure of the State to preserve evidentiary material requires a different result than when the State suppresses evidence.[70] The Court justified its holding on the basis that it did not read the Due Process Clause as imposing on the police an "undifferentiated and absolute duty" to preserve all material of conceivable evidentiary significance.[71]

In a dissenting opinion Justice Blackmun contended that the majority's holding was an unjustified departure from the standards established in the *Brady* line of cases, and that bad faith itself is difficult to assess.[72] Justice Blackmun further argued that the defendant was deprived of a fair trial pursuant to the *Brady* test, because the evidence was "constitutionally material," and its absence had prejudiced Youngblood.[73]

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65. *Youngblood*, 488 U.S. at 53.

66. *Id.* at 54, 55.

67. *Id.* at 54 (internal quotation marks omitted) (quoting the trial court transcript).

68. *Id.* (internal quotation marks omitted) (quoting State v. Youngblood, 734 P.2d 592, 596 (Ariz. Ct. App. 1986), in turn quoting State v. Escalante, 734 P.2d 597, 603 (Ariz. Ct. App. 1986)). The Supreme Court of Arizona denied the State's petition for review, and the United States Supreme Court thereafter granted certiorari. *Id.* at 55.

69. *Id.* at 58.

70. *Id.* at 57.

71. *Id.* at 58.

72. *Id.* at 61, 66 (Blackmun, J., dissenting). Justices Brennan and Marshall joined Justice Blackmun's dissent. *Id.* at 61.

73. *Id.* at 61.

(3) Formulating Standards in Response to Different Types of Missing Evidence in Maryland.[74]—Maryland courts have observed and followed the distinction between withheld evidence and missing evidence.[75] Thus, courts in Maryland do not impose as heavy a burden with respect to missing evidence as they do with respect to suppressed evidence. In many cases, the courts have found this lesser burden on the State to be an important factor weighing against allowing a defendant a positive inference from missing evidence.[76]

Although the *Youngblood* Court did not distinguish between different types of missing evidence, missing evidence is a general term that can refer to three distinct situations: (1) when there is better evidence available, but the State relies on the weaker evidence; (2) when the State has failed to preserve evidence; and (3) when the evidence was in possession of the State, but was then lost or is missing due to the State's intentional or unintentional actions.[77] In all three categories of cases, Maryland courts focus their analysis on the materiality of the evidence and the likelihood of prejudice to the defendant if the request for an evidentiary inference is not granted.[78]

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74. The missing evidence cases closely parallel the missing witness cases in both Maryland and federal law. The missing witness cases are considered part of the area of constitutionally guaranteed access to evidence addressed by the *Brady* test and therefore will be used with the missing evidence cases to illustrate important points. *See Patterson*, 356 Md. at 684, 741 A.2d at 1122 (analogizing the missing evidence case at issue with *Davis v. State*, 333 Md. 27, 633 A.2d 867 (1993), a missing witness case). *See generally* Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair*, 44 MD. L. REV. 137 (1985) (examining the history of the missing witness jury instruction).

75. *See infra* notes 88-101 and accompanying text (describing how Maryland courts have distinguished missing and suppressed evidence).

76. *See Youngblood*, 488 U.S. at 58 (expressing reluctance to interpret the Due Process Clause as imposing on the State the "undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance"); State v. Werkheiser, 299 Md. 529, 537-38, 474 A.2d 898, 903 (1984) (adopting the Idaho Supreme Court's rationale that the right to due process does not include the right to compel the State to produce potentially exculpatory evidence on behalf of the defendant (quoting People v. Culp, 537 P.2d 746, 748 (Colo. 1975) (en banc), in turn quoting State v. Reyna, 448 P.2d 762, 767 (Idaho 1968)))).

77. *See, e.g.*, Eley v. State, 288 Md. 548, 555, 419 A.2d 384, 388 (1980) (finding that the availability of better evidence may entitle the defendant to an evidentiary inference if the State relies on the weaker evidence instead of the stronger evidence); Hall v. State, 69 Md. App. 37, 55, 516 A.2d 204, 213 (1986) (finding that the defendant was entitled to a favorable inference when material evidence was lost); Bailey v. State, 63 Md. App. 594, 610-11, 493 A.2d 396, 404 (1985) (treating evidence that the State failed to preserve as missing).

78. *See Eley*, 288 Md. at 554, 419 A.2d at 387 (assessing the materiality of the missing evidence in terms of its type, reliability, and availability to the parties); *Bailey*, 63 Md. App. at 610-11, 493 A.2d at 404 (examining materiality in terms of the evidence's cumulative nature).

(i) The Availability of Better Evidence.—In *Eley v. State*,[79] the prosecution relied on weaker evidence despite the availability of better evidence.[80] The defendant was charged with assault with intent to murder and robbery with a deadly weapon.[81] The State chose not to present fingerprint evidence to the jury regarding a stolen car, relying instead on an eyewitness identification.[82]

The trial court refused to allow defense counsel to comment on the lack of fingerprint evidence in closing argument, and the defendant appealed on the basis that such refusal was error.[83] The Court of Appeals reversed and remanded the case for a new trial, holding that, "where a better method of identification may be available and the State offers no explanation whatsoever for its failure to come forward with such evidence, it is not unreasonable to allow the defendant to call attention to its failure to do so."[84] The *Eley* court assessed the materiality of the evidence by considering that fingerprint evidence is a routine and reliable method of identification, that the lack of such evidence went unexplained at trial, that such evidence would not have been unimportant or cumulative, and that it was uniquely available to the State.[85] The *Eley* court therefore held that when stronger evidence is available, and the State relies on the weaker evidence, the defendant is entitled to comment on the State's lack of evidence.[86]

(ii) Failure to Preserve Evidence.—The Court of Special Appeals addressed the failure of the State to preserve evidence in *Bailey v. State*[87] and found that the missing evidence did not prejudice the defendant, because it would have been cumulative to the evidence already provided.[88] The defendant contended on appeal that the State's "mishandling of the pubic hairs and semen slides it took from the victim's body denied him the due process of law guaranteed by the Fourteenth Amendment."[89] Specifically, the defendant claimed that

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79. 288 Md. 548, 419 A.2d 384 (1980).

80. *Id.* at 555-56, 419 A.2d at 388.

81. *Id.* at 548, 419 A.2d at 384.

82. *Id.* at 549-50, 419 A.2d at 385. The eyewitness had personal motives for identifying Eley as the perpetrator of the crime, and thus the court indicated that fingerprint identification of Eley would have been a better method of identification. *Id.* at 553, 419 A.2d at 387.

83. *Id.* at 551, 419 A.2d at 385.

84. *Id.* at 554, 419 A.2d at 387.

85. *Id.*

86. *Id.* at 555, 419 A.2d at 388.

87. 63 Md. App. 594, 493 A.2d 396 (1985).

88. *Id.* at 610-11, 493 A.2d at 404.

89. *Id.* at 607, 493 A.2d at 402.

the trial court erred: (1) when it sustained the State's objection to a question that allegedly would have shown that the investigators did not follow proper procedures; and (2) by granting the State's motion in limine to prohibit a defense witness from testifying on the issue of whether the State had followed standard forensic procedures.[90]

The court acknowledged *Eley* and the general proposition that

> "[w]here it is apparent that a party has the power to produce evidence of a more explicit, direct, and satisfactory character than that which he does introduce and relies on, it may be presumed that if the more satisfactory evidence had been given it would have laid open deficiencies in, and objections to, his case which the more obscure and uncertain evidence did not disclose."[91]

However, the court did not find error in the trial judge's actions, because had the evidence been admitted, it merely would have been cumulative to the evidence already presented, and, therefore, its absence was essentially harmless and did not prejudice the defendant.[92]

(iii) Failure to Produce Lost Evidence.—In *Hall v. State*,[93] a case involving failure of the State to produce lost evidence, the defendant was sentenced to 80 years in prison for various offenses, including burglary, assault with intent to murder, assault with intent to prevent lawful apprehension, and use of a handgun in a crime of violence.[94] The missing evidence in *Hall* was a cardboard box found in the burglarized home from which the police obtained a latent print of the defendant.[95] Defense counsel argued to the trial court that because the box was not retained by the police after the print was lifted, the jury should have been instructed that Hall was entitled to a favorable inference regarding that evidence.[96] The trial court denied the requested instruction, and the Court of Special Appeals found that the trial court's instruction adequately covered the possibility of alternative explanations regarding the fingerprint evidence, and, therefore, the absence of the requested instruction did not prejudice the defendant.[97]

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90. *Id.* at 608, 493 A.2d at 402-03.
91. *Id.* at 609, 493 A.2d at 403 (quoting 31A CJS EVIDENCE § 156(1) (1964)).
92. *Id.* at 610-11, 493 A.2d at 404.
93. 69 Md. App. 37, 516 A.2d 204 (1986).
94. *Id.* at 41, 516 A.2d at 206.
95. *Id.* at 51, 516 A.2d at 211.
96. *Id.* at 54, 516 A.2d at 212-13.
97. *Id.* at 55, 516 A.2d at 213. The instruction given stated in part: "[T]he fingerprint evidence found at the scene of the crime must be coupled with evidence of other circum-

These cases show that Maryland courts consider the materiality of the evidence with respect to the defendant's guilt or innocence and the extent to which a trial court's denial of a missing evidence jury instruction has a prejudicial effect on the defendant's case.[98] By addressing the State's ability to produce better evidence in *Eley*, the Court of Appeals established that the State is accountable for missing evidence when the evidence at issue is particularly available to the State and is of the sort that the State normally would present.[99] The court's consideration as to the cumulative nature or significance of the evidence as illustrated in *Bailey* and *Hall* indicate that the State may likewise be held accountable when the evidence is material to the defendant's guilt or innocence.[100] Exceptions to this general rule occur when the absence of the evidence can be explained, when the evidence is cumulative to that already presented, or when the evidence is generally insignificant to the case.[101]

c. Consideration of the Historically Favored Form of the Evidentiary Inference in Maryland.—Once a court determines that the State is accountable for missing evidence, it must determine what procedural remedies exist for the defendant. The majority of Maryland cases hold that the correct remedy is an evidentiary inference that, had the

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stances tending to reasonably to [sic] exclude the hypothesis that the print was impressed at a time other than that of the time of the crime in order to prove the identification of the defendant." *Id.*

98. *See* Eley v. State, 288 Md. 548, 544, 419 A.2d 384, 387 (1980) (considering whether the missing evidence was of a type likely to be exculpatory and whether it was equally available to both parties); *Hall*, 69 Md. App. at 55, 516 A.2d at 212-13 (determining that the lack of a jury instruction did not prejudice the defendant); *Bailey*, 63 Md. App. at 610-11, 493 A.2d at 404 (discussing the prejudice caused to the defendant by the missing evidence).

99. *Eley*, 288 Md. at 554, 419 A.2d at 387.

100. *See Hall*, 69 Md. App. at 55, 516 A.2d at 213 (upholding a jury instruction which advised the jury that they may infer that the missing evidence was material); *Bailey*, 63 Md. App. at 610, 493 A.2d at 404 (advocating a materiality analysis regardless of the good or bad faith of the State).

101. *See* Bruce v. State, 318 Md. 706, 731, 569 A.2d 1254, 1267 (1990) (holding that an inference is improper where the missing evidence is merely cumulative to evidence already admitted, such as a witness who had already been presented); *Eley*, 288 Md. at 554, 419 A.2d at 387 (noting that the failure of the State to produce the best evidence available could be called into question by the defendant); *Bailey*, 63 Md. App. at 610, 493 A.2d at 404 (finding that no violation occurred when the defendant could elicit the same information from different witnesses); *see also* Yuen v. State, 43 Md. App. 109, 112, 403 A.2d 819, 822 (1979) (prohibiting an inference when the missing witness was equally available to both sides).

evidence been produced, it would have favored the defendant's theory of the case.[102]

Missing evidence inferences are usually granted in some form when: (1) the evidence is "peculiarly available" to one party; (2) it is neither unimportant nor cumulative; and (3) its absence is unexplained by the State.[103] In Maryland, the missing evidence inference can take the form of either closing argument or a missing evidence jury instruction, provided that the requirements of the rule are satisfied.[104] The weight given the inference clearly differs between these two forms, making the jury instruction more desirable to the defendant, but also less likely to be permitted by the trial court.[105] Although the missing evidence is theoretically available, in practice Maryland courts have never held that a party is "entitled" to a missing evidence instruction.[106]

Judges prefer closing argument as the form for evidentiary inferences resulting from missing evidence. In *Robinson v. State*,[107] the Court of Appeals observed that "[j]urors routinely apply their common sense, powers of logic, and accumulated experiences in life to

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102. *See* State v. Werkheiser, 299 Md. 529, 538, 474 A.2d 898, 903 (1984) (observing that an inference is favored over other remedies because it can "compel the State to gather in the accused's behalf what might be exculpatory evidence" (quoting People v. Culp, 537 P.2d 746, 748 (Colo. 1975) (en banc) quoting in turn, State v. Reyna, 448 P.2d 762, 767 (Idaho 1968))). Although *Culp* and *Reyna* dealt specifically with evidentiary issues regarding chemical and blood tests, respectively, the court in *Werkheiser* extended the reasoning from those cases to "other forms of evidence which the State may not have available for trial." *Id.* This evidentiary inference is based on the "best evidence rule" and the "spoliation doctrine."

The best evidence rule operates to exclude secondary sources when primary evidence is available. Blackstone concisely stated the point: "If it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed." 3 W. BLACKSTONE, COMMENTARIES 1326-27 (Lewis ed. 1922).

The spoliation doctrine posits that intentional efforts by a party to conceal evidence from the fact-finder implies weakness in that party's case. Stier, *supra* note 74, at 139-43. The ancient maxim, *contra spoliatorem omnia praesumuntur*, was adopted at common law when a party intentionally kept evidence from the fact-finder through suppression or destruction. *Id.* at 140 (footnote omitted) (citing BLACK'S LAW DICTIONARY 1257 (5th ed. 1979)).

103. *See Eley*, 288 Md. at 553-56, 419 A.2d at 387-88; Washington v. Davis, 438 P.2d 185, 188-90 (Wash. 1968).

104. *See Bruce*, 318 Md. at 729-31, 569 A.2d at 1266-67 (discussing the various ways inferences may be used in the fact-finding process).

105. Davis v. State, 333 Md. 27, 52, 633 A.2d 867, 879 (1993) (discussing the difficulties in applying the missing witness jury instruction). Trial courts must apply the requirements of the missing evidence rule more stringently in the context of the jury instruction than in closing argument to avoid prejudicing the party against whom the inference operates. *Id.*

106. *See Bailey*, 63 Md. App. at 611, 493 A.2d at 404.

107. 315 Md. 309, 554 A.2d 395 (1989).

arrive at conclusions from demonstrated sets of facts," and, therefore, missing evidence instructions usually are not necessary.[108]

The *Youngblood* line of cases makes it clear that a jury instruction is an appropriate remedy only when the State acted in bad faith.[109] Courts justify this requirement by reasoning that failure to grant a missing evidence instruction does not remove the inference that the missing evidence would favor the defendant from the realm of the jury's consideration, and, therefore, any prejudice created by the failure to grant such instruction is diminished.[110]

3. The Court's Reasoning.—In *Patterson v. State*, the Court of Appeals considered whether the trial court erred in refusing to give the requested missing evidence instruction and whether that refusal constituted a denial of due process.[111] With respect to the first question, the *Patterson* court stated that when possibly relevant evidence is not introduced, and its absence is unexplained, the defense may address the inference against the State during closing arguments.[112] On the second question, the court held that the police acted in good faith concerning the missing evidence at issue, and, therefore, there was no violation of the defendant's due process rights.[113]

a. The Missing Evidence Jury Instruction.—The court began its analysis by acknowledging that Maryland Rule 4-325(c) requires the trial court in a criminal case to instruct the jury on the applicable law, provided that the requested instruction is a correct statement of the law, is applicable to the facts of the case, and is not covered elsewhere in the jury instruction that is actually given.[114] However, as the court pointed out, Rule 4-325(c) only applies to matters of law and not to factual matters or inferences of fact such as evidentiary inferences.[115]

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108. *Id.* at 318, 554 A.2d at 399.

109. *See, e.g.*, United States v. Artero, 121 F.3d 1256, 1259 (9th Cir. 1997) (denying the requested adverse inference instruction because the defendant could not show that the State had acted in bad faith); United States v. Westerdahl, 727 F. Supp. 1364, 1366 (D. Or. 1989) (noting that the Government's failure to preserve potentially exculpatory evidence violates due process only if the Government acted in bad faith).

110. *See* Yuen v. State, 43 Md. App. 109, 114, 403 A.2d 819, 823 (1979).

111. *Patterson*, 356 Md. at 681, 741 A.2d at 1120.

112. *Id.* at 682, 741 A.2d at 1121.

113. *Id.* at 699, 741 A.2d at 1130.

114. MD. R. 4-325(c) (1999); *Patterson*, 356 Md. at 683-84, 741 A.2d at 1122 (citing Ware v. State, 348 Md. 19, 58, 702 A.2d 669, 718 (1997)).

115. *Patterson*, 356 Md. at 683-84, 741 A.2d at 1122. As factual issues, evidentiary inferences can be distinguished from instructions on the elements of the crime, instructions as to affirmative defenses available to the defendant, and from evidentiary presumptions recognized by the law, but not obvious to the jury. *Id.*

The court noted that several inferences may be drawn from the same set of facts and pointed to *Bailey v. State*[116] to support the finding that no party is entitled to a missing evidence instruction, and prejudice does not usually result from the refusal of the trial judge to grant such an instruction.[117]

The court rejected Patterson's reliance on Maryland cases that allowed criminal defendants missing evidence jury instructions.[118] The court also dismissed Patterson's reliance on an earlier case, *State v. Wadlow*,[119] by noting that although *Wadlow* permitted the jury instruction to stand, the court in that case did not hold that such an instruction is mandatory.[120] The court then factually distinguished *State v. Werkheiser*[121] from the case *sub judice* on the basis that *Werkheiser* involved a police officer who breached his statutorily defined duties by not taking steps to obtain such evidence as was required under the relevant statute.[122]

The court drew a parallel between missing evidence cases and missing witness cases, noting that the missing witness instruction is generally disfavored when the inference instead can be discussed in closing argument.[123] In the context of missing evidence instructions, the court held that "regardless of the evidence, a missing evidence instruction generally need not be given; the failure to give such an instruction is neither error nor an abuse of discretion."[124] Although the trial judge in *Patterson* denied the instruction, he did instruct the jury that they could "draw any reasonable inferences or conclusions from the evidence that [they] believe[d] to be justified by common sense and [their] own experiences."[125] The court concluded that this instruction, coupled with defense counsel's closing argument presenting the adverse inference to the jury, satisfied Patterson's "ability to draw an inference against the State."[126]

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116. 63 Md. App. 594, 611-12, 493 A.2d 396, 404 (1985) (noting that no Maryland court has held that a party has a right to a missing evidence instruction and pointing to the availability of the inference instead).

117. *Patterson*, 356 Md. at 685, 741 A.2d at 1123 (quoting *Bailey*, 63 Md. App. at 611-12, 493 A.2d at 404).

118. *Id.* at 687-88, 741 A.2d at 1124 (explicitly rejecting the suggestion that the court had ever required inferences to be presented in the form of a jury instruction).

119. 93 Md. App. 260, 611 A.2d 1091 (1992).

120. *Patterson*, 356 Md. at 686-87, 741 A.2d at 1124.

121. 299 Md. 529, 474 A.2d 898 (1984).

122. *Patterson*, 356 Md. at 687-88 & n.3, 741 A.2d at 1124 & n.3.

123. *Id.* at 688, 741 A.2d at 1124.

124. *Id.*

125. *Id.* at 689, 741 A.2d at 1125 (internal quotation marks omitted) (quoting the trial court's actual instruction to the jury).

126. *Id.* at 690, 741 A.2d at 1126.

The court concluded its discussion of the missing evidence instruction by pointing to the acceptance by Alaska and Delaware courts, and by various federal courts, of the principle that missing evidence instructions are not required and are considered discretionary.[127] The court then overruled any opinions of the Court of Special Appeals that were contrary to its holding, and clarified that any of its own opinions that may be subject to different interpretations should now be interpreted in line with the holding set forth in *Patterson*.[128]

b. Due Process Concerns.—Noting that the Supreme Court's interpretation of the Due Process Clause of the Fourteenth Amendment is generally applicable in interpreting Article 24 of the Maryland Declaration of Rights, the court next analyzed the due process issues presented by Patterson through the framework established by the Court.[129] The court adopted the *Youngblood* analysis by noting that, although *Brady* makes good or bad faith irrelevant when the State fails to disclose material exculpatory evidence, a different result is required when addressing the State's failure to preserve evidentiary materials that only have the *potential* to be exculpatory.[130] The court justified the difference in treatment on the basis that: (1) the "fundamental fairness" requirement of the Due Process Clause should not impose an "undifferentiated and absolute duty" to retain and preserve all material that has potential evidentiary significance; and (2) courts are largely unwilling to divine the significance of materials which are lost.[131]

The court held that the *Youngblood* standard logically extends to the refusal to grant a jury instruction on the State's failure to preserve evidence.[132] The court further explained that negligence was not sufficient for bad faith, and, even when an inference is appropriate, use

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127. *Id.* at 691-93, 741 A.2d at 1127-28 (citing United States v. Artero, 121 F.3d 1256, 1259 (9th Cir. 1997) (rejecting the defendant's request for a missing evidence instruction by noting that such an instruction is simply not required); Riney v. State, 935 P.2d 828, 839-40 (Alaska Ct. App. 1997) (holding that the defendant was not entitled to a missing evidence instruction); Cook v. State, 728 A.2d 1173, 1176-77 (Del. Super. Ct. 1999) (observing that the trial court was correct to deny the missing evidence instruction)).

128. *Id.* at 694, 741 A.2d at 1128.

129. *Id.* The court noted that the guarantees in Maryland's Declaration of Rights parallel similar provisions in the federal constitution. *Id.* (citing MD. CONST. DECL. OF RIGHTS art. 24). Therefore, the same standards are applicable whether the claim alleges a violation of state or federal constitutional rights. *Id.*

130. *Id.* at 694-95, 741 A.2d at 1128 (footnote omitted) (quoting Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988)).

131. *Id.* at 695, 741 A.2d at 1128 (quoting *Youngblood*, 488 U.S. at 57-58).

132. *Id.* at 696, 741 A.2d at 1128-29.

of the jury instruction is not necessarily the proper remedy.[133] The court concluded that because Patterson failed to provide any evidence that the police had acted in bad faith with respect to the missing jacket, his due process rights were not violated.[134]

4. Analysis.—Although the *Patterson* court was correct in following *Youngblood*, its adoption of the Supreme Court's missing evidence standard was a blanket one, substituting *Youngblood*'s analysis in place of its own.[135] In this way, the *Patterson* decision has become the state counterpart to *Youngblood*, and any understanding of how *Patterson* changed the law in Maryland requires an understanding of how *Youngblood* changed the law on the federal level. When the *Patterson* court uncritically adopted the *Youngblood* bad faith analysis, it incorporated that test into Maryland law without reconciling it with precedent that had analyzed missing evidence under the *Brady* materiality test.[136] In the past Maryland courts have looked to the reasons underlying why evidence is missing to determine whether to impose sanctions against the State.[137] This tradition is undermined by the *Youngblood* test because that test compacts missing evidence into a single formula subject to uniform treatment.[138]

By failing to examine the underpinnings of *Youngblood* in reaching its own decision in *Patterson*, the Court of Appeals joins the Supreme Court in manipulating precedent to avoid an undesirable result, and, in so doing, departs from the *Brady* line of cases that Maryland has followed for the last thirty-six years by making an artificial distinction between missing evidence and suppressed evidence.[139]

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133. *Id.* at 697, 741 A.2d at 1129.

134. *Id.* at 699, 741 A.2d at 1130.

135. *See id.* at 695-96, 741 A.2d at 1128-29 (excerpting one full page of text from the *Youngblood* opinion). The Court of Appeals of Maryland has considered the Maryland Declaration of Rights as "*in pari materia* with similar provisions of the federal constitution." *Id.* at 694, 741 A.2d at 1128.

136. *See Patterson*, 356 Md. at 694, 741 A.2d at 1128 (acknowledging that *Patterson* overruled prior inconsistent decisions).

137. *See supra* notes 74-110 and accompanying text (describing how Maryland courts address individually the three types of missing evidence—reliance on weaker evidence when better evidence is available, failure of the State to preserve evidence, and lost or missing evidence).

138. *See* Arizona v. Youngblood, 488 U.S. 51, 57-59 (1988) (discussing missing evidence without defining the scope of "missing").

139. *See supra* note 70 and accompanying text (discussing how the *Youngblood* Court separated missing evidence cases and suppressed evidence cases into two distinct categories).

a. California v. Trombetta*'s Role in Bridging the Gap Between* Brady *and* Youngblood.—*California v. Trombetta*[140] is a case with many meanings. Although it did not claim to be a departure from the *Brady* line of cases, the *Youngblood* Court interpreted *Trombetta* as a break from the objective test promulgated by the Supreme Court twenty-five years prior to *Youngblood*.[141] Despite the understanding of *Trombetta* adopted by the *Youngblood* Court, the Court in *Trombetta* reached its holding by applying a *Brady* materiality analysis.[142]

(1) Trombetta *as a Continuation of the* Brady *Line of Cases: The Objective Test, But with a Subjective Component.*—Although the promise of *Brady*—the prospect of open discovery—disappeared over the thirty-two year span from *Brady* to *Strickler v. Greene*,[143] the objective test continued to be used to evaluate the exculpatory nature of the evidence, disregard the good or bad faith of the State when determining materiality, and conceptualize the criminal trial as a search for truth rather than an adversarial contest between the prosecution and the defense.[144]

Trombetta added to, without departing from, the objective test promulgated by the *Brady* cases.[145] By noting that the failure to preserve breath samples was "'in good faith and in accord with [the police's] normal practice,'"[146] the Court suggested that the State's good

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140. 467 U.S. 479 (1984).

141. *See Youngblood*, 488 U.S. at 56-58 (discussing the good faith analysis applied in *Trombetta* and developing it into a general rule applicable to all cases of missing or destroyed evidence). Although the Supreme Court developed the *Brady* test over the twenty-five year span between *Brady* and *Youngblood*, the essential components laid out in *Brady* remain the same. *See supra* notes 35-46 and accompanying text (tracing the development of the *Brady* test from *Brady v. Maryland*, 373 U.S. 83 (1963), to *Strickler v. Greene*, 527 U.S. 263 (1999)).

142. *See Trombetta*, 467 U.S. at 489-90 (applying the *Brady* test to reach the holding that the failure to preserve breath samples did not violate the defendant's due process rights); *see also supra* notes 51-61 and accompanying text (summarizing the *Trombetta* Court's analysis).

143. 527 U.S. 263 (1999).

144. These elements place the emphasis of any materiality inquiry on the nature of the evidence rather than subjective factors such as the good or bad faith of the State in concealing or producing that evidence. *See supra* notes 35-46 and accompanying text (tracing the Supreme Court's development of the *Brady* test).

145. *Trombetta*, 467 U.S. at 488. The current formulation of the *Brady* test, announced in *United States v. Bagley*, 473 U.S. 667, 682 (1985), and followed in the most recent *Brady* case, *Strickler v. Greene*, 527 U.S. 263 (1999), states that a *Brady* violation only occurs when "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.

146. *Trombetta*, 467 U.S. at 488 (quoting Killian v. United States, 368 U.S. 231, 242 (1961)). In his dissent in *Youngblood*, Justice Blackmun argued that this phrase did not have the significance attributed to it by the majority. *Youngblood*, 488 U.S. at 65 (Black-

faith would not be enough to justify the failure to preserve potentially material evidence, but, had the State acted in bad faith, that "conscious effort to suppress exculpatory evidence," would weigh in favor of the defense.[147] The *Trombetta* Court seemingly envisioned that only bad faith on behalf of the State would be an element of the due process analysis.

The *Trombetta* Court did not rest its analysis on the good faith assessment alone. The Court began its discussion of materiality with the sentence: "More importantly, California's policy of not preserving breath samples is without constitutional defect."[148] This sentence implies either that the good faith analysis is secondary to the materiality analysis, or that the good faith analysis does not impact the determination of constitutionality at all.[149] The Court in *Trombetta* did not present a clear picture of the role it expected good faith to play in the due process analysis, but this introductory sentence implies that whatever the role, it is secondary to the materiality analysis.[150] The "more importantly" language indicates that the good faith analysis is important, but that the materiality analysis is even more so; and the latter part of the sentence suggests that *only* the materiality analysis impacts the constitutionality of the State's practice.[151]

Pursuant to the *Brady* materiality analysis, the *Trombetta* Court then evaluated the exculpatory value of the destroyed evidence and assessed the availability of comparable evidence to the defense before concluding that the State's failure to preserve the evidence did not violate the defendant's due process rights.[152] Although the Court noted that "evidence destroyed through prosecutorial neglect or oversight," was an area lacking "doctrinal development," it proceeded to

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mun, J., dissenting). He explained that the emphasis was on the "in accord with their normal practice," part of the sentence, rather than on the "good faith" part. *Id.*

147. *Trombetta*, 467 U.S. at 488. The Court referred to the good faith of the State only to indicate that the State was not acting in bad faith. *Id.* It was a neutral commentary implying that bad faith would weigh against the State, but good faith should be expected, not rewarded, as the *Youngblood* Court suggested thereafter. *Id.*; *see Youngblood*, 488 U.S. at 57-58.

148. *Trombetta*, 467 U.S. at 488.

149. *See* Matthew H. Lembke, Note, *The Role of Police Culpability in* Leon *and* Youngblood, 76 VA. L. REV. 1213, 1218 (1990) (indicating the importance of that sentence in understanding *Trombetta*, and analyzing its component parts).

150. *See Trombetta*, 467 U.S. at 488.

151. *Id.*

152. *Id.* The breath samples did not produce any exculpatory value because they had been tested already, and the results were actually *incriminating*. *Id.* at 489. The comparable evidence that was available—the results of the intoxilyzer test—were determined to be accurate in all but a "tiny fraction of cases," and once the intoxilyzer indicated that the person was "legally drunk," the results were even more likely to be accurate. *Id.*

analyze destruction of evidence as falling within the area of constitutionally guaranteed access to evidence.[153] By remaining within the rubric of the *Brady* line of cases, the *Trombetta* Court treated the difference between suppressed evidence and destroyed evidence as one of degree, not one of kind. Acknowledging this relationship, the Court introduced the subjective bad faith analysis as an addition to the objective test, not as a replacement.

By grouping destruction of evidence or missing evidence cases under the same umbrella used to encompass suppressed evidence cases, the Court indicated that the cases were more similar than they were different, and the same analytical framework would apply to both sets of cases.[154] If *Trombetta* is interpreted as establishing a good faith test, as the *Youngblood* Court construed it, that test only modifies the *Brady* materiality analysis.

(2) The Youngblood *Court's Interpretation and Application of* Trombetta.—To arrive at its desired result, the *Youngblood* Court manipulated the meaning of *Trombetta* to create an artificial divide between suppressed evidence and destroyed or missing evidence.[155] The facts of *Youngblood* were particularly reprehensible, and if the Court had found that the State destroyed material evidence in violation of defendant's due process rights, the defendant would have been acquitted.[156] To avoid freeing a man found guilty of sexually assaulting a ten-year-old boy, the Court adopted the bad faith test, and, in so doing, curtailed the rights of all criminal defendants.[157]

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153. *Id.* at 486.

154. *See id.* at 488 (using both nondisclosure cases and destruction of evidence cases to provide a framework for analyzing the case at hand).

155. "[T]he Court took a surprising step away from what seemed to be the direction and logic of *Trombetta* and, in so doing, substantially diminished the constitutional protection afforded defendants." Lembke, *supra* note 149, at 1220.

156. *See* Arizona v. Youngblood, 488 U.S. 51, 52 (1988) (explaining that over the course of only a few hours, Youngblood sodomized the victim multiple times). The remedy in cases involving destruction of evidence can only be acquittal because a new trial, absent the destroyed evidence, would not remedy the constitutional harm done to the defendant. Robert Hochman, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1697 n.98 (1996). Suppressed evidence cases can order a new trial because the State presumably has possession of the evidence. *Id.*

157. *See generally* Lembke, *supra* note 149, at 1220 (arguing that the Court "substantially diminished the constitutional protection afforded defendants"); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 769 (1999) (suggesting that the *Youngblood* Court raised the defendant's burden of proof to an unrealistic level); *see* Hon. H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1106 (1991) (noting that *Youngblood* resulted in de-emphasizing criminal defendants' right to evidence).

The Court relied on *Trombetta* to provide precedential value to the subjective test.[158] The *Youngblood* Court recognized that *Trombetta* was decided on bases other than the good faith of the State, but chose to focus on that aspect of the analysis alone.[159] Instead of limiting the analysis—as the *Trombetta* Court did—to allow only bad faith acts to factor into the materiality assessment,[160] the Court turned *Trombetta* on its head by substituting the good faith actions of the State for the materiality analysis.[161] The *Youngblood* Court compressed the good faith and materiality analyses followed in *Trombetta* into a singular equation: If the State acted in good faith when disposing of the evidence, the evidence was not exculpatory; but if the defendant can prove that the State acted in bad faith, the evidence may be exculpatory.[162]

Brady explicitly declared that the good or bad faith of the State is irrelevant in determining the materiality of the evidence.[163] The *Youngblood* Court effectively side-stepped *Brady*'s touchstone by using

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158. *See Youngblood*, 488 U.S. at 57-58 (using the good faith analysis in *Trombetta* and that Court's comments about the difficulty in applying the objective test to missing or destroyed evidence cases to conclude that the good faith/ bad faith analysis alone is the most accurate way to evaluate missing or destroyed evidence).

159. *Id.* The Court acknowledged early in the opinion that the State had complied with *Brady* and *United States v. Agurs*, 427 U.S. 97 (1976), before stating that *Youngblood* was outside of *Brady*, and, therefore, the State did not need to fulfill the requirements of the materiality analysis. *Youngblood*, 488 U.S. at 55.

160. *See supra* note 147 and accompanying text (describing how the *Trombetta* Court did not allow the good faith of the State to enter into the materiality assessment).

161. *Youngblood*, 488 U.S. at 57-58. The *Youngblood* opinion also took language from other cases out of context to show some precedential basis for its departure from the *Brady* test. The Court cited *United States v. Marion*, 404 U.S. 307 (1971), for the point that "'[n]o actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees to harass them.'" *Youngblood*, 488 U.S. at 57 (quoting *Marion*, 404 U.S. at 325). However, this quotation only partially supported the Court's adoption of the subjective test because the first part of the sentence focused on a materiality analysis; prejudice to the defendant was one necessary element to proving a *Brady* violation. *See Marion*, 404 U.S. at 325. The other case the Court decided on language taken out of context was *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), which held that "the prompt deportation of the witnesses was justified 'upon the Executive's good faith determination that they possess[ed] no evidence favorable to the defendant in a criminal prosecution.'" *Id.* (quoting *Valenzuela-Bernal*, 458 U.S. at 867). The quotation again failed to support the argument that there was precedent for applying exclusively the subjective test. The proper focus of the statement was not on the Executive's good faith, but rather that the determination concerned the materiality of the evidence at issue—the witnesses' testimony. *See Valenzuela-Bernal*, 485 U.S. at 867.

162. *See* Lembke, *supra* note 149, at 1222 (stating that the *Youngblood* Court "collapsed any materiality inquiry into the bad faith analysis" and that the *Youngblood* standard seems to require "a defendant to prove both that the evidence was exculpatory and that the police knew it" (footnote omitted)).

163. Brady v. Maryland, 373 U.S. 83, 87 (1963).

Trombetta to describe the relationship between missing evidence and suppressed evidence as different in kind, rather than degree, thus requiring completely different treatment.[164] The Court noted that "[p]art of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta* . . . that '[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.'"[165] While the *Trombetta* Court employed the *Brady* test despite the difficulties of doing so, the *Youngblood* Court expanded this difficulty into an impossibility and created a realm of cases exempt from *Brady*'s requirements.[166]

The *Youngblood* Court also ignored the *Trombetta* Court's deliberate attempt to limit its holding to the specific facts of that case.[167] The crux of the *Trombetta* Court's analysis was that the defendant's breath samples did not have exculpatory value before they were destroyed, because the intoxilyzer test had already shown them to be incriminating, and the test results—a form of comparable evidence—were available to the defendant.[168]

The defense in *Youngblood* wanted to subject the semen stains on the victim's clothing to tests.[169] The clothing was not produced, and the tests were not performed.[170] Since the tests had never been performed, there was no evidence comparable to the semen-stained clothing.[171] Unlike *Youngblood*, tests were performed on the *Trombetta* evidence from which results were obtained that incriminated the de-

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164. *See Youngblood*, 488 U.S. at 57-58 (arguing that the Due Process Clause requires a different result in missing or destroyed evidence cases than in suppressed evidence cases). The First Circuit would later refer to the Court's splintering of missing evidence cases off the *Brady* tree as creating "two distinct universes." United States v. Femia, 9 F.3d 990, 993 (1st Cir. 1993).

165. *Youngblood*, 488 U.S. at 58 (second alteration in original).

166. *See id.* at 57-58.

167. The *Trombetta* Court recognized the need to limit its analysis to the case before it, whereas the Court in *Youngblood* used the narrow facts of the case at hand to launch an overly-broad rule for future cases. *Compare Trombetta*, 467 U.S. at 491 (holding that "the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis test at trial" (footnote omitted)), *with Youngblood*, 488 U.S. at 58 (holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

168. *Trombetta*, 467 U.S. at 489-90.

169. *Youngblood*, 488 U.S. at 53-54.

170. *Id.* at 54.

171. The evidence comparable to the raw data available in *Trombetta* was the test results, whereas in *Youngblood*, there was no comparable evidence available at all. *See id.*

fendant.[172] The *Youngblood* Court even stated: "the likelihood that the preserved materials would have enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta*."[173] Despite this admission, the Court clung to the irrelevant distinction that the State in *Trombetta* had used the intoxilyzer results against the defendant, whereas the State in *Youngblood* did not attempt to use the missing test results.[174] This distinction is nonsensical because there were no test results in *Youngblood* to use against the defendant.

b. The Meaning of the Youngblood *Court's Departure from the Objective Test Established by the* Brady *Line of Cases.*—The *Youngblood* Court drastically altered the focus of the criminal trial by adopting the bad faith test.[175] The Court replaced the notion of the criminal trial as a search for truth with the adversarial model of the criminal trial.[176] In so doing, the Court reallocated the burden of proof more heavily on the defendant and threatened the defendant's right to a fair trial.

The *Brady* Court formulated the objective test to emphasize the fairness and truth-seeking elements of the criminal trial.[177] Writing for the majority, Justice Brennan explicitly rejected the pure adversarial model and stated that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair."[178] The objective test formulated in *Brady* linked the evaluation of the materiality of evidence to the preservation of the fair trial.[179]

The subjective test necessarily creates an adversarial version of the criminal trial. The bad faith test "creates a perverse incentive for police officers": when evidence is suppressed, the suppression is evaluated under the *Brady* test, but when evidence is destroyed, the destruc-

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172. In *Trombetta*, the defendant wanted the raw data to challenge the test results extracted from that data. In *Youngblood*, there were neither test results nor the data on which to perform the test.

173. *Youngblood*, 488 U.S. at 56.

174. *See id.*

175. "[T]he Court's 'bad faith' holding represented a major theoretical shift away from the objective analysis of the evidence and how its unavailability affected the defendant's ability to receive a fair trial." Sarokin & Zuckerman, *supra* note 157, at 1106.

176. *See* Lembke, *supra* note 149, at 1237 (suggesting that the *Youngblood* Court "ignor[ed] the fact that the government's interest is 'not to obtain convictions, but rather to obtain justice.'"); *see also supra* note 175.

177. *See* Hochman, *supra* note 156, at 1674 (discussing the *Brady* Court's rejection of the adversarial model in favor of the fair trial).

178. Brady v. Maryland, 373 U.S. 83, 87 (1963).

179. *Id.* at 87-88 ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant" resulting in a proceeding that does not comport with the standards of justice).

tion is considered under the *Youngblood* test, which is more favorable to the spoliator than *Brady*.[180]

The subjective test adopted by the *Youngblood* Court places a heavy burden on the defendant. Under the subjective test, no matter how material the evidence is, there is no constitutional protection for the defendant unless he can show bad faith.[181] The Court did not specify which acts constitute bad faith.[182] The only evidence that would clearly support a bad faith assertion would be direct testimony—a confession that the police or the prosecutor destroyed the evidence knowing that doing so would eliminate material evidence.[183]

The benefit of the "trial as a search for truth" model is that the burden of proof is allocated to the prosecution because the truth will more likely be revealed when the party marshaling the most resources is responsible for producing evidence that may bear on the defendant's guilt or innocence.[184] Placing the burden of preserving evidence on the State ensures that future criminal defendants have access to as much potentially exculpatory evidence as possible, both increasing the likelihood of a fair trial and saving governmental resources from being expended on imprisoning innocent defendants.[185]

c. Was Departure Necessary?—Alternatives That Remain Within the Realm of Brady.—The *Youngblood* Court could have raised the bar without abandoning the objective test. Some states have embraced the promise of *Brady* by permitting open discovery for criminal de-

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180. *The Supreme Court—Leading Cases*, 103 HARV. L. REV. 137, 164 (1989). It is unlikely that a criminal defendant will be able to prove that a state actor destroyed evidence knowing it was exculpatory. *See* Lembke, *supra* note 149, at 1223 (arguing that the "practical effect" of the bad faith test is to "rob defendants of any meaningful due process protection").

181. *See* Lembke, *supra* note 149, at 1223 (discussing the challenges to the defendant under the subjective test).

182. *See id.* at 1222.

183. *See* Arizona v. Youngblood, 488 U.S. 51, 66-67 (1988) (Blackmun, J., dissenting) (arguing that the majority did not make it clear whether actual malice is required to show bad faith, or whether "recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence," would be sufficient).

184. The "beyond a reasonable doubt" standard clearly places the burden of proof on the prosecution, and the idea that criminal defendants are innocent until proven guilty similarly places the burden on the State. *See generally* Sarokin & Zuckerman, *supra* note 157, at 1089-91 (discussing the presumption of innocence in the federal court system). When restrictions are imposed on a defendant's access to evidence, the right of defendants to a fair criminal trial is threatened.

185. *See* Lembke, *supra* note 149, at 1239-40 (arguing that there are significant policy reasons for "encouraging the police to take great care in preserving potentially exculpatory evidence").

fendants.[186] Open discovery is the surest way of protecting the fair trial and ensuring that the trial is used as a vehicle for discovering truth, but despite its success is some states, it is not the most reasonable suggestion for the federal courts.[187]

In his *Youngblood* dissent, Justice Blackmun proposed a three-part inquiry to determine the materiality of evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated defendant."[188] This test is in accord with *Trombetta* because it acknowledges the primary importance of a materiality analysis and the necessity for evaluating missing evidence on a case-by-case basis.[189] The test suggests that evidence is material if: (1) the evidence is of a type that would be relevant; (2) the evidence embodies some immutable characteristic of the assailant; and (3) the evidence is likely to be independently exculpatory.[190] Another factor that may be considered in this analysis is the type of technology available to analyze the evidence, and the error rate of that technology.[191]

The characteristics outlined by Justice Blackmun are designed to apply the materiality test to evidence no longer available for testing or other analysis.[192] By focusing on the *type* of the evidence at issue, it is possible to ascertain to some extent the likelihood that the evidence is material.[193] This test remains within the realm of *Brady* by focusing on the materiality of the evidence to the defendant's guilt or innocence, by rejecting the subjective approach, and by staying true to the idea that the criminal trial should be used as a vehicle for pursuing truth.

5. Conclusion.—By manipulating *California v. Trombetta*, and essentially ignoring the *Brady* line of cases, the *Youngblood* Court eliminated the applicability of the *Brady* test for constitutional materiality to an entire class of cases. In so doing, the Court revived the dis-

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186. *See* Sarokin & Zuckerman, *supra* note 157, at 1108 (exhorting Congress to follow the lead of New Jersey and California in adopting open criminal discovery).

187. *See id.* (discussing the benefits of open discovery).

188. *Youngblood*, 488 U.S. at 57 (Blackmun, J., dissenting).

189. *See* Lembke, *supra* note 149, at 1242 (setting forth the elements of Justice Blackmun's "constitutional materiality" test).

190. *Youngblood*, 488 U.S. at 70-71 (Blackmun, J., dissenting).

191. *Id.* at 71.

192. *See id.* at 69 (noting that something more is required when evaluating evidence, the nature of which is unknown).

193. *See id.* (suggesting that the State should focus on the type of evidence, its possible exculpatory value, and the existence of other evidence tending to prove the same point).

carded adversarial model of the criminal trial and imposed a heavy burden on criminal defendants.

In failing to reconcile the *Youngblood* test with Maryland precedent, the Court of Appeals in *Patterson* gave no guidance to practitioners on the extent to which the traditional Maryland distinction between different types of missing evidence will apply in future cases. By adopting the *Youngblood* test, the *Patterson* court made a critical area of criminal law unnecessarily confusing and needlessly restricted the due process rights of criminal defendants.

JESSICA M. HALL

IX. HEALTH CARE

A. *Strict Adherence to Criteria in Maryland's Health Care Decisions Act in Order to Exercise the Right to Control End-of-Life Decisions*

In *Wright v. Johns Hopkins Health Care Systems Corp.*,[1] the Court of Appeals considered whether to uphold an individual's right to refuse medical intervention when the patient had failed to express his intent regarding end-of-life issues in the precise manner required by the Health Care Decisions Act of 1993 (the HCDA).[2] Acting in support of the state's interest in the preservation of life, the court ruled that the decedent's attempts to create written and oral advance directives failed to meet the detailed requirements outlined by the HCDA.[3] The court reasoned that when a discrepancy exists between the procedures required by the statute and the documentation prepared by the decedent, the disparity invalidates the decedent's attempt to create advance directives.[4]

The court's decision in *Wright* announces that individuals who wish to control their end-of-life medical interventions must strictly adhere to the statutory guidelines of the HCDA. *Wright* also suggests that the court views the HCDA as a balanced legislative attempt to regulate the multitude of end-of-life issues in a manner that respects individual choices while still recognizing the underlying state interest in the preservation of life. Although the HCDA itself creates significant freedom of choice for individuals who precisely adhere to the specific guidelines, the court is unwilling to permit a broad interpretation of the statute for those individuals whose actions fall short of the statute's requirements.

1. The Case.—Robert L. Wright, Jr., was a thirty-three-year-old male diagnosed with AIDS in the mid-1980s.[5] On July 18, 1994, Wright was admitted to Johns Hopkins Hospital for treatment of acute renal failure.[6] Although he was scheduled to leave the hospital on July 20 after he received a blood transfusion, shortly after the procedure, Wright went into cardiac arrest.[7] The doctors and nurses imme-

1. 353 Md. 568, 728 A.2d 166 (1999).

2. *Id.* at 586, 728 A.2d at 174; MD. CODE ANN., HEALTH-GEN. I §§ 5-601 to -618 (1994) (amended 2000).

3. *Wright*, 353 Md. at 591-92, 728 A.2d at 177.

4. *Id.* at 594-95, 728 A.2d at 179.

5. *Id.* at 580, 728 A.2d at 172.

6. *Id.* at 578-79, 728 A.2d at 171.

7. *Id.* at 579, 728 A.2d at 171.

diately initiated cardiopulmonary resuscitation, under the orders of the resident physician assigned to Wright.[8]

After the cardiac arrest, Wright's mother asked physicians to remove her son's breathing tube and return him to the inpatient medical service to receive only comfort care.[9] Wright's home health care nurse notified hospital staff that Wright had a written living will, which stated that he wanted to be placed in a "do not resuscitate/do not intubate" (DNR/DNI) status and that he did not want to receive life-sustaining treatment at the end of his life.[10] Wright was extubated and transferred back to his original internal medicine service at the hospital.[11] Although able to breathe independently, he remained in a coma for two days.[12] After regaining consciousness, he did not communicate again other than to moan and call out to his mother.[13] On July 30, twelve days after his admission to Johns Hopkins Hospital and ten days after receiving the treatment to reverse his cardiac arrest status, Wright died.[14]

Wright's family and estate brought a negligence action in the Circuit Court of Baltimore City against Johns Hopkins Health Systems Corporation, Johns Hopkins Hospital, Johns Hopkins University, and the four physicians involved with Wright's care.[15] Plaintiffs alleged that the defendants breached both statutory and common-law duties of care when they performed CPR on Wright against his wishes.[16] The defendants moved for summary judgment, claiming that no liability could exist because the decedent's living will was inoperative, and that the HCDA allowed for emergency treatment of a patient even in the absence of informed consent.[17]

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8. *Id.*

9. *Id.* Robert Wright's parents and home health care nurse did not arrive at the hospital until after the cardiac arrest and completion of the subsequent CPR procedures. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 580, 728 A.2d at 172.

13. *Id.*

14. *Id.*

15. *Id.* at 571, 728 A.2d at 167. The plaintiffs' specific causes of action included: (1) negligent failure to adhere to the terms of a valid living will; (2) wrongful death; (3) battery as a result of providing medical intervention without obtaining informed consent from the decedent or his appointed health care agent; and (4) negligence due to failure to provide Wright's parents with information necessary for obtaining proper informed consent. *Id.* at 583, 728 A.2d at 173.

16. *Id.*

17. *Id.* at 584, 728 A.2d at 173. In response to the plaintiffs' other counts, the defendants claimed that there was no recognized legal claim for the wrongful death damages and that no battery had occurred. *Id.*

The circuit court ruled in favor of the defendants, finding that because the decedent was neither terminal nor in an end-stage condition, the criteria established by his living will were not satisfied.[18] In addition, the court found that the need for a rapid response to the cardiac arrest emergency superseded any obligation to "'seek and obtain either consent of a health care agent or formal medical certification of the decedent's pre-arrest medical condition as might warrant a declination to resuscitate.'"[19]

Plaintiffs appealed to the Court of Special Appeals, but before that court reviewed the case, defendants petitioned the Court of Appeals for a writ of certiorari.[20] Plaintiffs then cross-petitioned, and the Court of Appeals granted certiorari.[21] The court effectually limited its review to two key issues: (1) whether the HCDA or the common law of Maryland allowed the plaintiffs to bring a cause of action against health care providers for failure to comply with the decedent's advance directives, and, if so, (2) whether the plaintiffs had "set forth sufficient facts to state causes of action for negligence, wrongful death, battery, and lack of informed consent."[22]

2. *Legal Background.*—The HCDA resulted from medical issues, arising both in Maryland and elsewhere, that raised questions about whether the Life-Sustaining Procedures Act[23] adequately addressed end-of-life situations resulting from technological advances in medicine.[24] In the national forum, the balancing act between individual liberty interests and a state's interests was first recognized in *Cruzan v. Director, Missouri Department of Health*,[25] where the national coverage of the United States Supreme Court case exposed the public to the concept that a competent individual was entitled, under certain circumstances, to refuse medical intervention.[26] A similar issue was addressed in Maryland in *In re Riddlemoser*.[27] Although it never actually addressed the question of whether a guardian could refuse medi-

18. *Id.*, 728 A.2d at 174.

19. *Id.* (quoting the circuit court).

20. *Id.* at 585, 728 A.2d at 174.

21. *Id.*

22. *Id.* The legal position established by the Court of Appeals in response to the two key issues would determine whether or not to address any of the remaining counts against the defendants. *Id.*

23. MD. CODE ANN., HEALTH-GEN. I § 5-602(a) (1982 & Supp. 1986) (repealed 1993) (describing procedures to follow when drafting an advance directive).

24. *See Wright*, 353 Md. at 573-74, 728 A.2d at 168-69.

25. 497 U.S. 261 (1991).

26. *See infra* notes 57-68 and accompanying text (describing *Cruzan* in further detail).

27. 317 Md. 496, 564 A.2d 812 (1989).

cal care on behalf of another, the Court of Appeals of Maryland first suggested that the existing statute might need modification.[28] Finally, in *Mack v. Mack*,[29] the Court of Appeals strongly advised the Maryland General Assembly to examine the Life-Sustaining Procedures Act because the protections provided by its language were no longer adequate to handle modern medical dilemmas such as persons in persistent vegetative states.[30] The legislature responded in 1993 by repealing the Life-Sustaining Procedures Act and relevant portions of the Estates and Trusts statute.[31]

a. Life-Sustaining Procedures Act: Initial Guidelines for End-of-Life Decisions.—In 1982, the Maryland legislature passed the Life-Sustaining Procedures Act.[32] This statute, along with applicable sections of the Estates and Trusts Code,[33] provided direction for the courts, health providers, and individuals, with respect to end-of-life decisions. Four of the sections of the Life-Sustaining Procedures Act, combined with provisions of the Estates and Trusts statute, formed the crux of the legislature's initial attempt to codify end-of-life planning.[34] These sections required fulfillment of certain statutory responsibilities assigned to the individual, the health provider, and the guardian, in order to benefit from any medical decisions made pursuant to the Act.[35]

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28. *See id.* at 500, 564 A.2d at 814 (discussing the trial court's refusal to uphold a request made by guardians to authorize a DNR status for an elderly woman who had sustained a stroke, because the guardians did not have this authority under the statutory law as it existed at that time); *id.* at 506, 564 A.2d at 817 (Adkins, J., concurring) (stating that the legislature should act to remove the ambiguity concerning guardianship and medical decisionmaking that existed in a section of the Estates & Trusts Code at that time).

29. 329 Md. 188, 618 A.2d 744 (1993).

30. *See id.* at 222, 618 A.2d at 761 ("The question of whether to adopt a quality of life-best interest standard concerns our societal values in a most fundamental sense. The answer to that question is quintessentially legislative."); *see also infra* notes 73-87 and accompanying text (describing *Mack* in further detail).

31. *See* MD. CODE ANN., HEALTH-GEN. I §§ 5-601 to -614 (1982 & Supp. 1986) (repealed 1993); *see also* MD. CODE ANN., EST. & TRUSTS, § 13-708(b)(8) (1991) (repealed 1993) (discussing aspects of guardianship that pertained to end-of-life decisionmaking).

32. MD. CODE ANN., HEALTH-GEN. I §§ 5-601 to -614 (repealed 1993) (describing the requirements to be fulfilled by any individual wishing to establish his end-of-life intentions with respect to medical interventions).

33. MD. CODE ANN., EST. & TRUSTS §§ 13-601, 13-607 to -708, 13-711 to -713.

34. MD. CODE ANN., HEALTH-GEN. I §§ 5-602(a), 5-603, 5-604, & 5-607 (repealed 1993) (containing statutory guidelines on creation of advance directives, and highlighting that very few medical professionals were granted any sort of statutory immunity for emergency care provided without prior consent).

35. *Id.*

Section 5-602(a) described the requirements placed upon an individual for a "declaration . . . directing the withholding or withdrawal of life-sustaining procedures."[36] These procedures included a dated, signed writing, prepared either by or on behalf of a competent adult, and witnessed by someone not "knowingly entitled to any portion of the estate of the declarant."[37] This section of the statute did not include any language addressing the issuance of oral advance directives.[38] Although there was no statutory provision allowing a declarant to modify the advance directives, section 5-603 authorized revocation of the document at any time.[39] Any person wishing to modify their existing document had to revoke the original and then draft a new declaration.[40]

Two sections of the Life-Sustaining Procedures Act that dealt with activation of the advance directive placed a burden directly on the health-care provider. Section 5-604 required the attending physician to certify the declarant's medical status as terminal in order to activate the procedures established by an advance directive.[41] The attending physician had to outline in writing his or her justification to certify that the patient was terminal.[42] This written documentation was maintained in the medical record of the declarant.[43]

Despite the certification requirement provided in section 5-604, the language of section 5-607 did not provide any immunity for the actions taken by most health care professionals.[44] The first portion of this section stated that, other than in a few narrowly defined exceptions, civil liability applied to any professional who provided care contrary to the directions contained in the advance directive.[45] The approved exceptions included paramedics, firefighters, and members of ambulance and rescue squads, as well as nonprofessionals who provided care in good faith.[46] The statutory language did not provide any

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36. *Id.* § 5-602(a).

37. *Id.* § 5-602(a)(4)(iii).

38. *See id.*

39. *See id.* § 5-603. Section 5-603 provided that individuals may revoke advance directive declarations either orally, in writing, or by destroying or defacing an existing declaration. *Id.*

40. *Id.*

41. *Id.* § 5-604(d)(1).

42. *Id.*

43. *Id.*

44. *Id.* § 5-607(a)-(c) (including statutory language that offered immunity only to a few categories of health care personnel, but not to the majority of the medical staff that could become involved in the provision of emergency interventions to the individual).

45. *Id.* § 5-607(a).

46. *Id.* § 5-607(b) & (c).

immunity to cover emergencies occurring in the absence of the attending physician that allowed no time for the staff to delay if the proposed medical intervention was to have any effect.[47]

The Life-Sustaining Procedures Act became more encompassing of end-of-life issues when read in conjunction with section 13-708(b) of the Estates and Trusts statute. That section allowed a guardian to authorize medical care or services deemed necessary for the patient.[48] The only exception to this broad authorization was the requirement in section 13-708(c) which stated that the court must give prior authorization of any medical procedure that could involve a "substantial risk" to the ward's life.[49]

As medical technology advanced, the Life-Sustaining Procedures Act became more difficult to administer in an even-handed manner. Even when read with its companion, section 13-708 of the Estates and Trusts statute, the language of the Act could not always provide guidance for the more complex end-of-life issues. For example, in *In re Riddlemoser*, the Court of Appeals considered whether it had the authority to broadly read section 13-708 to allow a guardian's request for issuance of a DNR status on behalf of an elderly unconscious woman in case the woman's medical condition led to a further episode of cardiac arrest.[50] On its face, section 13-708(b)(8) addressed only a guardian's ability to authorize treatment by acting independently or,

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47. *See id.* § 5-607(b). For example, section 5-604(a)(1) does not address the appropriate course of action to follow if an unconscious patient with an advance directive arrives in the emergency room of a hospital for treatment and the attending physician is not available to provide certification. *Id.* § 5-604(a)(1).

48. MD. CODE ANN., EST. & TRUSTS § 13-708(b)(8) (1991) (repealed 1993). Section 13-708(b)(8) stated in full:

> Subject to subsection (a) of this section, the rights, duties, and powers which the court may order include, but are not limited to:
>
> . . . .
>
> (8) The power to give necessary consent or approval for:
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> (i) Medical or other professional care, counsel, treatment or service;
>
> (ii) Withholding medical or other professional care, counsel, treatment or service; and
>
> (iii) Withdrawing medical or other professional care, counsel, treatment, or service.

Id.

49. *Id.* § 13-708(c).

50. 317 Md. 496, 498, 564 A.2d 812, 813 (1993). *Riddlemoser* involved an elderly disabled woman admitted to the hospital in a comatose condition after sustaining a stroke. *Id.* at 500, 564 A.2d at 814. Her guardians petitioned the Circuit Court for Baltimore City to allow them to refuse CPR intervention on behalf of the patient if a cardiac arrest occurred during the woman's hospitalization pursuant to section 13-709(b)(8) of the Estates and Trusts statute. *Id.*

in special circumstances, after obtaining the approval of the court.[51] The statutory language neither authorized nor specifically forbade the withholding of any medical treatment that might hasten the end of a patient's life.[52] The lower court did not address the guardian's request for an expansive reading of the Estates and Trusts statute, stating that this type of decision was not within its powers.[53] When the Court of Appeals heard the case, it acknowledged the ambiguity in the Estates and Trusts statute as to the court's power to authorize or forbid the withholding of medical treatment, but found the case moot because the patient had already died.[54] However, in a concurring opinion, Judge Adkins encouraged the legislature to take action to clarify the applicable statutes on this issue.[55] Although the court ultimately found the case moot, the opinion reflected the court's reluctance to broadly interpret statutes when life or death issues were at stake, as well as an acknowledgment that the language of both the Life-Sustaining Procedures Act and applicable portions of the Estates and Trusts statute might need modification in the near future.[56]

b. Before the HCDA: Cruzan *Balances Personal Liberty Interests with States' Interests in the Preservation of Life.*—In *Cruzan v. Director, Missouri Department of Health*,[57] the United States Supreme Court addressed for the first time whether there was a constitutional right to refuse medical treatment when the choice would result in death.[58] Ultimately, the Court refused to accept Nancy Cruzan's parents' substituted judgment concerning the removal of these medical interventions, because Ms. Cruzan had not previously made her wishes on the matter known.[59] The Supreme Court adopted this position despite its awareness that, due to Ms. Cruzan's medical condition, she would never be able to speak for herself on these matters.[60] However, the Court split 5-4, with a majority of the Justices acknowledging that

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51. *See* MD. CODE ANN., EST. & TRUSTS § 13-708(b)(i) (repealed 1993).

52. *See Riddlemoser*, 317 Md. at 503, 564 A.2d at 816 (stating that section 13-708(b)(8) grants the court power to enforce the implementation of medical treatment, but does not grant it explicit power to authorize the withdrawal of treatment).

53. *Id.* at 501, 564 A.2d at 814-15.

54. *Id.* at 505, 564 A.2d at 817.

55. *Id.* at 506, 564 A.2d at 817 (Adkins, J., concurring).

56. *See id.* (stating that "the public interest calls for action to end the ambiguity").

57. 497 U.S. 261 (1990).

58. *Id.* at 269. Nancy Cruzan existed in a persistent vegetative state for almost a decade while her parents tried to compel first the Missouri courts, and then the United States Supreme Court, to grant permission to terminate their daughter's artificial life support. *Id.* at 267-69.

59. *Id.* at 286-87.

60. *See id.* at 265.

under certain circumstances there is a right to refuse medical treatment, even when exercising this right could result in death.[61]

Chief Justice Rhenquist, writing for the majority, emphasized the importance of supporting the state's duty to protect its most vulnerable citizens.[62] The Chief Justice explained that because the interests at stake were so substantial, the state could place a more stringent standard of proof and its correlating risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment.[63] He added that "[a]n erroneous decision not to terminate results in a maintenance of the status quo," thus allowing for the possibility of subsequent medical advances and changes in the law.[64] The majority's position expressed an unwillingness to end a life when any ambiguity existed as to that individual's informed choice concerning the refusal of medical treatment, even when this position had irreversible consequences for the patient involved.[65]

In a concurring opinion, Justice O'Connor noted that earlier rulings by the Supreme Court allowed an inference that there is a protected liberty interest in the refusal of unwanted medical treatment.[66] However, she found that it was up to each individual state to establish the means by which a citizen could invoke this liberty interest.[67] Both Justices Brennan and Stevens, in their respective dissents, found that Nancy Cruzan's Fourteenth Amendment liberty interest included a fundamental right to be free of unwanted artificial nutrition and hydration.[68]

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61. *Id.* at 280 ("[F]or purposes of this case, we assume that the United States Constitution would grant a *competent* person a constitutionally protected right to refuse lifesaving hydration and nutrition."); *id.* at 289 (O'Connor, J., concurring) ("[T]he liberty guaranteed by the Due Process Clause must protect, if it protects anything, [a competent] individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."). Justice Brennan, joined by Justices Marshall and Blackmun, asserted that "Nancy Cruzan [had] a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State." *Id.* at 302 (Brennan, J., dissenting). Justice Stevens, in his dissent, argued that individuals have a fundamental right to refuse life-sustaining medical treatment regardless of whether they are competent or incompetent. *Id.* at 343-44 (Stevens, J., dissenting).

62. *See Cruzan*, 497 U.S. at 281-82.

63. *Id.* at 283.

64. *Id.*

65. *See id.* at 284.

66. *Id.* at 287 (O'Connor, J., concurring) ("Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause." (citing Rochin v. California, 342 U.S. 165, 172 (1952); Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891))).

67. *Id.* at 292.

68. *Id.* at 302 (Brennan, J., dissenting); *id.* at 343-44 (Stevens, J., dissenting).

Cruzan advanced the idea that there is a constitutionally protected right to refuse medical intervention. Future cases would grapple with how best to balance the state's interest in preserving life against an individual's interest in bodily autonomy.

c. The Revised Life-Sustaining Procedures Act.—The Maryland legislature drafted a 1990 revision to the Life-Sustaining Procedures Act that allowed a broader interpretation of its statutory language—an especially important consideration in light of *Cruzan*'s impact in this area.[69] The Maryland Attorney General opined that the revised Act's language included artificially administered sustenance (food and hydration) within the general terms of medical treatment or procedures.[70] Now, the Maryland courts could view the removal of an artificial feeding device as the equivalent of the removal of any other medical device.[71] This broad interpretation could provide guidance for families seeking to withhold or discontinue artificial sustenance from individuals at the end of life in situations similar to that faced by the guardians in *Cruzan*.

Although the Attorney General's opinion offered support for those seeking a court order to cease the administration of hydration or sustenance, the revised Act failed to address explicitly the question of whether life-sustaining *treatment* could be withheld.[72] In 1993, the Court of Appeals in *Mack v. Mack*[73] refused to extend the language of section 13-708(b) & (c) of the Estates and Trusts statute[74] to authorize actions taken by guardians that might have a negative impact on the state's interest in protecting its vulnerable citizens.[75] *Mack* involved the guardianship of a previously competent adult hospital patient who

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69. MD. CODE ANN., HEALTH-GEN. I, §§ 5-601 to -616 (1982) (amended 1990) (repealed 1993) (providing greater clarification for end-of-life medical decisionmaking by guardians); *see Cruzan*, 497 U.S. at 278 (recognizing the existence of a liberty interest, although the court did not clearly specify when or how this liberty interest could be invoked).

70. 75 Op. Att'y Gen. 253, 253-54 (Sept. 24, 1990) (providing clarification that sections 13-708(b) & (c) of the Estates and Trusts statute allowed certain medical interventions, including hydration and nutrition, to be withheld per guardian request if the statutory guidelines were followed).

71. *See id.*

72. *See id.* (opining only that hydration and sustenance were included in those medical procedures that a patient or surrogate could choose to forgo, but not specifically discussing whether DNR orders could be requested by surrogates). *But cf. In re* Riddlemoser, 317 Md. 496, 506, 564 A.2d 812, 817 (1983) (Adkins, J., concurring) (urging the legislature to clarify whether the relevant statutes grant courts the power to authorize a disabled person's guardian to permit the withholding of life-sustaining procedures).

73. 329 Md. 188, 618 A.2d 744 (1993).

74. MD. CODE ANN., EST. & TRUSTS § 13-708(b) & (c) (1991) (repealed 1993).

75. *Mack*, 329 Md. at 197-98, 618 A.2d at 749.

existed in a persistent vegetative state since an automobile accident ten years earlier.[76] Ronald Mack's family petitioned the Circuit Court for Baltimore County for appointment as his guardian to prevent his spouse, a Florida resident, from transferring him from Maryland to Florida so that she could then request a Florida court to allow termination of medical treatment.[77]

The court first examined whether Florida could exercise personal jurisdiction over Ronald Mack, so that it could authorize his spouse as his legal guardian.[78] After determining that the Florida court did not have jurisdiction, the Court of Appeals considered the issue of guardianship for Ronald Mack.[79] According to section 13-707(a) of the Estates and Trusts statute, the spouse had the highest priority for guardianship appointment.[80] Finally, the court rejected her arguments that as a guardian, she could make decisions for Ronald Mack based on what a reasonable person in his situation would want or under the correlating legal standard—what was in Mack's best interest.[81] Instead, the Court of Appeals required Deanna Mack to provide clear and convincing evidence that her spouse would have wanted the withdrawal of life-sustaining medical interventions if he were still capable of making independent judgments.[82] Without sufficient proof of Ronald Mack's intentions concerning end-of-life interventions, the court made its decision using the guidelines established by the legislature in section 13-708 of the Estates and Trusts statute.[83] These guidelines did not permit guardians to make medical decisions for their wards based on personal determinations concerning the disabled individual's quality of life.[84]

The Court of Appeals found that *Mack* raised a social issue that was not adequately addressed by either the revised Life-Sustaining

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76. *Id.* 192, 618 A.2d at 746.

77. *Id.* at 193-94, 618 A.2d at 747. Ronald Mack's spouse, Deanna Mack, originally obtained guardianship over her husband from the Maryland courts in 1984. *Id.* at 193, 618 A.2d at 747. She later moved to Florida, where she filed for, and was granted, guardianship over her husband by the Florida courts. *Id.* at 193-94, 618 A.2d at 747. She was then discharged as guardian under the Maryland appointment. *Id.* at 194, 618 A.2d at 747. Several months later, Ronald Mack's father, a Maryland resident, petitioned to become his son's legal guardian. *Id.*

78. *Id.* at 198-200, 618 A.2d at 749-50.

79. *Id.* at 200, 618 A.2d at 750.

80. *Id.* at 203, 618 A.2d at 752; *see also* MD. CODE ANN., EST. & TRUSTS § 13-707(a) (1991) (repealed 1993).

81. *Mack*, 329 Md. at 218-22, 618 A.2d at 759-61.

82. *Id.* at 207, 618 A.2d at 753.

83. *Id.* at 221, 618 A.2d at 760-61; *see* MD. CODE ANN., EST. & TRUSTS § 13-708(b) & (c) (repealed 1993).

84. *See Mack*, 329 Md. at 221, 618 A.2d at 761.

Procedures Act or the applicable sections of the Estates and Trusts statute.[85] The court then expressly recommended that the legislature take action to address this type of situation.[86] The refusal of the court to interpret broadly the then-existing guardianship statute prompted the call for a more comprehensive statute to address the full spectrum of end-of-life issues.[87]

d. The Health Care Decisions Act.—On the heels of the *Mack* decision, the Maryland legislature drafted the 1993 HCDA to address the growing number of issues concerning end-of-life care.[88] Legal scholarship analyzing the creation of the HCDA points to the original legislative intent to provide each competent individual with an opportunity to make decisions concerning his or her final medical interventions.[89] The HCDA itself outlines the required procedural steps to complete when drafting a binding advance directive to address end-of-life issues.[90] The statute also allows the appointment of a health care agent to direct medical interventions on the patient's behalf when at a later point the patient is no longer competent.[91]

Four sections of the Health Care Decisions Act affect the rights of a hospitalized person concerning the administration of end-of-life interventions.[92] Together, these sections provide guidance for some of the questions not adequately addressed by the earlier Life-Sustaining Procedures Act. Section 5-602(a) discusses the drafting of advance

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85. *Id.* at 222, 618 A.2d at 761 ("The answer to that question [concerning adoption of a quality-of-life standard for situations such as that of Ronald Mack] is quintessentially legislative.").

86. *See id.*

87. The court stated:

> Unless and until current public policy, as we perceive it, is changed by the General Assembly, sustaining Ronald and other persons like him, whose desires concerning the withdrawal of artificial sustenance cannot clearly be determined, is a price paid for the benefit of living in a society that highly values human life.

Id.

88. *See* MD. CODE ANN., HEALTH-GEN. I §§ 5-601 to -618 (1994) (amended 2000).

89. *See* John Carroll Byrnes, *The Health Care Decisions Act of 1993*, 23 U. BALT. L. REV. 1, 62 (1993) ("Although there were reasonable differences in emphasis, there was consensus as to the intent of this legislation—to honor . . . the individual's right to make personal health care decisions . . . .").

90. MD. CODE ANN., HEALTH-GEN. I § 5-602(a); *see infra* notes 93-97 and accompanying text (describing the necessary elements for drafting an oral and written advance directive according to the HCDA guidelines).

91. *See* MD. CODE ANN., HEALTH-GEN. I § 5-602(b).

92. *See id.* § 5-602(a) & (d) (explaining how to create an oral or written advance directive); *id.* § 5-602(e) (describing the certification process required before activation of the advance directive); *id.* § 5-604 (explaining how to cancel an existing advance directive); *id.* § 5-607 (outlining the statutory protection available to medical providers who are unable to obtain informed consent prior to provision of emergency care).

directives.[93] These written or oral instructions allow competent adults over the age of eighteen to pre-select which health care procedures should be provided or withheld under specific health conditions.[94] A written advance directive can follow any format, but requires a signature by, or on the express direction of, the declarant and two witnesses.[95] Once created, it becomes the responsibility of the individual or some other knowledgeable person to notify the physicians involved with the medical care that the advance directive document exists.[96] Once notified, the physician must place a copy of the advance directive in the patient's medical chart.[97]

Section 5-602(d) addresses the needs of those who fail to prepare a written advance directive before the occurrence of their illness or injury by allowing the patient to issue an oral advance directive instead.[98] The HCDA's requirements compel the individual to outline orally his or her specific intentions concerning medical care during the present procedure or admission, disallowing any statements made during earlier admissions.[99] Once the attending physician completely understands the wishes of the individual, he or she must immediately document this information in the medical record.[100] This allows the information from the oral advance directive to be readily available to all providers associated with the case.

Section 5-602(e) describes the mandatory certification procedures required before a health care provider can act upon an oral or written advance directive.[101] Before the advance directive's instructions concerning the provision, withdrawal, or withholding of a medical intervention may be followed, the attending physician and one other doctor must certify that the declarant is unable to make an on-

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93. *Id.* § 5-602(a). Section 5-602 (a) states in relevant part: "Any competent individual may, at any time, make a written advance directive regarding the provision of health care to that individual, or the withholding or withdrawal of health care from that individual." *Id.*

94. *Id.*

95. *Id.* § 5-602(c).

96. *Id.* § 5-602(f)(1).

97. *Id.* § 5-602(f)(2).

98. *Id.* § 5-602(d). Section 5-602(d) states in relevant part: "[A]n oral advance directive shall have the same effect as a written advance directive if made in the presence of the attending physician and one witness and documented as part of the individual's medical record." *Id.*

99. *Id.*

100. *Id.* § 5-602(f)(2).

101. *Id.* § 5-602(e). Section 5-602(e) states in relevant part: "[A]n advance directive shall become effective when the declarant's attending physician and a second physician certify in writing that the patient is incapable of making an informed decision."

the-spot informed decision about his or her medical situation.[102] After making that decision, an appointed health care agent can represent the declarant's interests.[103] When there is no appointed agent, the provision of medical interventions must continue unless certification occurs.[104] Even after certification of the declarant's incapacity occurs, there is still an additional requirement to meet before any activation of the advance directive: the declarant must be in a terminal or end-stage condition.[105] Only when the declarant is in such a condition, or if a physician trained in brain function assessment certifies that the declarant is in a persistent vegetative state, can the health providers act according to any guidelines established in the declarant's advance directive.[106]

Although section 5-604 permits an individual to cancel or modify the advance directive at any time, emergency medical circumstances may not provide an individual with time to reconsider the choices requested in the original document.[107] Should an individual intend to change the terms of the document, but become either incompetent or unconscious before taking action, the terms of the existing oral or written advance directive continue to dictate which medical interventions are authorized.[108]

Section 5-607 allows medical providers to bypass the informed consent process in an emergency situation.[109] The medical team also receives immunity from liability while performing emergency life-saving procedures, according to the statutory language used in section 5-609.[110] This immunity for good faith efforts offers health providers the freedom to make essential decisions and to begin necessary treat-

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102. *Id.* Section 5-606(a)(1) requires that one of the two doctors who certified the declarant's status must have personally examined the patient within two hours of this decision. *Id.* However, if the declarant becomes unable to communicate or lapses into unconsciousness, this criteria is lessened, requiring only the attending physician to attest to the declarant's status. *Id.* § 5-606(a)(2).

103. *Id.* § 5-602(b).

104. *See id.* § 5-606(a) (stating that certification must occur prior to any withholding, withdrawal, or provision of medical interventions as outlined in an advance directive).

105. *See id.* § 5-606(b)(1).

106. *Id.* § 5-606(b).

107. *See id.* § 5-604. Section 5-604 states in relevant part, "[a]n advance directive may be revoked at any time by a declarant by a signed and dated writing, by physical cancellation or destruction, by an oral statement to a health care practitioner or by the execution of a subsequent directive." *Id.*

108. *Id.* § 5-606(a)(2).

109. *Id.* § 5-607.

110. *Id.* § 5-609(a)(2).

ments without the hesitancy induced by fear of potential litigation based on lack of consent.[111]

The HCDA's multi-step process supports the legislative intent to ensure that any decisions to withhold, withdraw, or provide life-sustaining medical care will be determined in a balanced manner.[112] By mandating participation of the attending physician before allowing activation of the advance directive, the legislature attempted to have these crucial decisions made by a medical professional already familiar with the patient's medical condition.[113]

3. The Court's Reasoning.—In *Wright*, the Court of Appeals handed down its first decision concerning end-of-life medical care since the implementation of the Health Care Decisions Act. Ultimately, the court held in favor of the defendants, finding that Wright's oral statements to nonattending physicians concerning "resuscitation" efforts were not a sufficient basis for finding that there was, in fact, a valid DNR order.[114] The court also held that even if Wright's living will had been available to health providers at the time of the resuscitation, it never became operative because its terms were not in accordance with the requirements set out by the HCDA.[115]

The court first addressed a threshold question: whether the HCDA or Maryland common law allowed the plaintiffs to bring a cause of action against the defendants for failure to comply with the decedent's advance directives.[116] In order to advance to the merits of the case, the court assumed that the decedent's family had the right to bring this action under the HCDA and state common law.[117]

On the merits, the court required that the plaintiffs "set forth sufficient facts to state causes of action for negligence, wrongful death, battery and lack of informed consent."[118] Focusing on the neg-

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111. *See* S. Elizabeth Wilborn Malloy, *Beyond Misguided Paternalism: Resuscitating the Right to Refuse Medical Treatment*, 33 WAKE FOREST L. REV. 1035, 1076 (1998) (discussing whether the fear of prosecution serves as an underlying impetus to the decision to resuscitate patients).

112. 78 Op. Att'y Gen. 208, 209-10 (June 1, 1993) (discussing the balance struck between an individual's right to health care decisionmaking and the state's interest in protecting its vulnerable citizens from decisions based on a valuation of the impaired person's worth to society).

113. MD. CODE ANN., HEALTH-GEN. I § 5-601(d) (defining an attending physician as one "[having] primary responsibility for the treatment and care of the patient").

114. *Wright*, 353 Md. at 591-92, 728 A.2d at 177.

115. *Id.* at 587-88, 728 A.2d at 175.

116. *Id.* at 585, 728 A.2d at 174.

117. *Id.* at 586, 728 A.2d at 175.

118. *Id.* at 585, 728 A.2d at 174.

ligence issue, the court considered whether the medical providers violated either the instructions set forth in Wright's living will, his oral advance directive, or his oral DNR instructions, even though these instructions did not fully meet the requirements of the HCDA.[119]

The court found that although Wright had drafted his living will under the earlier Life-Sustaining Procedures Act, because that Act was repealed in 1993, the HCDA now governed all living wills created either under the old statute or under the present HCDA.[120] Therefore, at the time of the CPR intervention, the living will was inoperable because Wright had not specified the conditions that would trigger the advance directive and because his physicians had not certified his DNR request as required by the HCDA.[121] These factors were a necessary prerequisite under the Act, notwithstanding the possibility that Wright's medical condition was terminal and death was imminent.[122] The court viewed Wright's inclusion of activation criteria as proof that he did not wish to refuse all interventions but instead wanted to ensure that he would receive only those medical interventions that his certifying physician deemed necessary.[123]

The court then summarily dealt with the claim alleging violation of a valid oral advance directive, stating that the HCDA standards for oral advance directives require the individual to make a statement to the attending physician in the presence of a witness, and the oral advance directive must be documented in the medical record.[124] The court found that Wright's medical record contained no documentation to support this claim.[125]

The court next addressed the plaintiff's claim that the defendant's actions violated a non-statutory DNR order.[126] Although it was undisputed that no formal DNR order was documented in Wright's medical record, the plaintiffs claimed that the decedent's intent for a DNR order could be inferred from statements made by the decedent to family and medical providers during the course of his illness and final hospitalization.[127] The decedent's mother reported statements

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119. *Id.* at 586-95, 728 A.2d at 175-79.

120. MD. CODE ANN., HEALTH-GEN. I § 5-616(b) (1994) (amended 2000) ("[A] valid living will or durable power of attorney for health care made prior to October 1, 1993 shall be given effect as provided in this article, even if not executed in accordance with the terms of this article.").

121. *Wright*, 353 Md. at 587, 728 A.2d at 175.

122. *Id.* at 588, 728 A.2d at 175.

123. *Id.*

124. *Id.* at 588-89, 728 A.2d at 176.

125. *Id.* at 589, 728 A.2d at 176.

126. *Id.* at 589-90, 728 A.2d at 176-77.

127. *Id.*

made by her son such as "'if he had a heart attack he didn't want any measures taken . . . just let him go.'"[128] However, the court found that the plaintiffs produced no evidence that Wright ever had made a clearly worded request of his primary care physician to enter a DNR status order into his medical record.[129] In rejecting the plaintiff's claim, the court explained that the plaintiffs' evidence only proved that Wright exhibited a "'generalized and open-ended desire'" to forgo life-sustaining procedures in some future circumstances, but these statements did not qualify as a valid request for DNR status under the conditions established by the HCDA.[130]

The court's ruling on the invalidity of the original written advance directive, the alleged oral advance directive, and the alleged DNR request prevented the plaintiffs from meeting their burden of proof required to uphold their negligence claims.[131] Although the plaintiffs had raised a number of other related issues, the failure to meet their burden on the negligence issues precluded the court from addressing the other causes of action.[132]

4. Analysis.—In *Wright*, the court correctly recognized Maryland's interest in the preservation of life over an individual's interest in refusing end-of-life medical interventions when that individual does not satisfy the HCDA's express requirements for creating advance directives.[133] In reaching this result, the court strictly interpreted the HCDA, clarifying that the legislative requirements outlined in the HCDA demand mandatory, not optional, adherence.[134] Because the court's choice of life preservation is now the default position for any ambiguous advance directives, *Wright* underscores the need for increased awareness by both the public and physicians with respect to the HCDA.[135]

Ultimately, the decision in *Wright* supports the state's role as protector of vulnerable individuals, as well as society's interest in maintaining the integrity of the medical profession—a balancing task that

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128. *Id.* at 589, 728 A.2d at 176 (quoting the deposition of Wright's mother).

129. *Id.* at 593, 728 A.2d at 178.

130. *Id.*

131. *Id.* at 587, 588-89, 728 A.2d at 175-76, 178-79.

132. *Id.* at 586, 728 A.2d at 175.

133. *See id.* at 595, 728 A.2d at 179 (holding that the performance of CPR was authorized under section 5-607 of the HCDA because it was an emergency medical provision given by providers in the absence of a binding advance directive or DNR order).

134. *Id.* at 585-86, 728 A.2d at 174-75.

135. *See* Diane E. Hoffmann, *Maryland Health Care Decisions Act: Achieving the Right Balance?*, 53 MD. L. REV. 1064, 1130 (1994) (discussing the need for consumers and health care providers to become more informed as to the value of advance directives).

requires physicians' respect for their patients' clear, autonomous end-of-life decisions, especially when such decisions differ from those which the physician might recommend.[136] To achieve these goals, the state must be willing to assume two ongoing burdens. The first task requires the careful monitoring of technological advances in medicine to ensure that existing statutes dealing with medical issues are comprehensive and relevant.[137] The second task involves educating members of the public not just to understand their end-of-life options, but to accept their role in satisfying the requirements that accompany any attempts to exercise these options.[138]

a. Protecting Vulnerable Individuals by Upholding the Integrity of the Medical Profession.—The *Wright* court's strict adherence to the procedural safeguards intentionally built into the statute by the legislature prevents the HCDA from becoming a state-supported mechanism that allows family or medical providers to rid the world of the permanently disabled.[139] In *Wright*, the court did not formally address the issue of whether the language of the HCDA protected medical providers from suits claiming wrongful emergency interventions. While the court's failure to discuss this point could be viewed as an oversight that leaves health care professionals uncertain as to their statutory protections under the HCDA, a closer examination of the context surrounding the *Wright* decision reveals that the court subtly provided valuable guidance in this area.

The court's demand for strict adherence to statutory guidelines before any advance directive or DNR request becomes operational places the majority of the advance directive burden on the autonomous patient.[140] The patient must first examine HCDA sections 5-602

136. *Cf.* Charity Scott, *Why Law Pervades Medicine: An Essay of Ethics in Health Care*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 245, 264-67 (2000) (discussing the historical move away from medical paternalism).

137. *See* Hoffmann, *supra* note 135, at 1130 (describing how the Maryland legislature acted in a timely manner to draft the HCDA in response to requests from families, courts, and medical providers to give individuals a larger role in medical decisionmaking).

138. *See* Mathy Mezey, *Community Education*, HASTINGS CEN. REP., Sept.-Oct. (1991), at S11 (discussing how changing an individual's behavior is the driving force behind several statewide programs that encourage collaborative community education on end-of-life issues).

139. *See* Jack Schwartz, *Trends in Health Care Decisionmaking: Introduction*, 53 MD. L. REV. 1041, 1045 (1994) (stating that the statute's phrasing strikes a careful balance between supporting patient autonomy and allowing providers to perform their jobs without undue hindrance).

140. *See Wright*, 353 Md. at 574-75, 728 A.2d at 169 (outlining the individual's responsibilities under the HCDA to correctly draft the advance directive documents and notify medical providers that these documents exist).

and 5-603, which describe the necessary procedures for drafting an advance directive, including the type of medical interventions that a particular individual might wish to receive or refuse.[141] Next, the individual must either draft the documents required by these sections—either an advance directive or the appointment of a health care agent—or make an oral advance directive in front of the individual's attending physician and one witness, document the request, and make certain that the physician has signed and dated the document as required by section 5-602 of the HCDA.[142] The individual's final responsibility is to notify the primary health care provider that an advance directive is in existence and provide a copy of the relevant paperwork.[143]

Only if an individual follows all of these steps before the need for emergency or routine medical intervention arises does the health care provider assume an obligation to alter the provision of standard medical procedures according to the patient's plans.[144] Otherwise, as seen by the court's ruling in *Wright*, health care providers are free to provide any necessary life or death emergency decisions without the fear of litigation.[145] Thus, the *Wright* decision suggests that Maryland courts will protect health care providers from liability pursuant to section 5-607, even if doing so might seem to support the letter, rather than the spirit, of the HCDA. Ironically, this seemingly rigid stance might lead to a more widespread acceptance of the HCDA's provisions within the medical community by making it clear that the courts expect complete adherence to those advance directives that *do* comply with statutory guidelines.[146]

b. Promoting Patient Autonomy over Paternalism.—The *Wright* court's holding also encourages the medical profession to forgo the traditional, paternalistic model of control in medical decisionmaking

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141. *See* MD. CODE ANN., HEALTH-GEN. I §§ 5-602 to -603 (1994) (amended 2000).

142. *Id.* § 5-602(a)-(d).

143. *Id.* § 5-602(f).

144. *See* Steven A. Levenson, *Maryland's 1993 Health Care Decisions Act—Implications for Health Care Practitioners*, 53 MD. L. REV. 1131, 1150 (1994) (explaining that although the health care provider can still provide emergency, life-saving care if required, this intervention may need to be reversed later if it is found to be contrary to an individual's documented wishes).

145. *See Wright*, 353 Md. at 595, 728 A.2d at 179; Levenson, *supra* note 144, at 1150 (noting that "[p]aradoxically, the HCDA's greater complexity compared with past laws ultimately facilitates the decisionmaking process and allows greater latitude for . . . health care providers, including physicians").

146. *See* Schwartz, *supra* note 139, at 1046 (emphasizing the importance of educating physicians about the need to pay attention to the provisions of the HCDA, for the benefit of themselves and their patients).

in favor of an autonomous, patient-centered approach.[147] Strict adherence to the HCDA's requirements provides clear guidelines for health care professionals to follow in determining whether to respect a patient's end-of-life decision—the decisionmaking power will remain with the providers unless the individual elects actively and clearly to make advance choices concerning end-of-life care or lack thereof.[148] In this way, the HCDA encourages a more informed relationship between the physician and her patient—a relationship that can only improve all-around medical care.

Medical providers claim that the entanglement of their profession with the legal community has left an impression with many patients that the lawyer is just another medical consultant assigned to their case,[149] and that the law's intrusiveness into the practice of medicine forces doctors to practice medicine in a defensive style, despite studies that show that many of these fears concerning potential litigation are unfounded.[150] For example, the national rate of malpractice litigation successfully sustained against health care providers accused of negligence is less than ten percent.[151] This statistic is especially surprising in light of articles that suggest that the actual number of negligence lawsuits that *could* be brought is much higher.[152] One of the reasons most frequently cited to explain the relatively low rate of litigation against physicians is the reluctance to sue one's health care provider if a good interpersonal relationship exists.[153] *Wright*'s strict interpretation of the HCDA builds on this aspect by encouraging an informed patient-physician relationship, with both parties participating in clearly expressed end-of-life decisions. Thus, the HCDA

147. *See* Malloy, *supra* note 111, at 1057-58 (defining a paternalistic control approach as one which considers the wishes of the patient only when the patient's desires are in agreement with those of the physician, contrary to the concept of individual autonomy).

148. *See Wright*, 583 Md. at 594-95, 728 A.2d at 179.

149. *See* Scott, *supra* note 136, at 272 (suggesting that lawyers became involved in health care, in part, because patients' rights were not always supported or acknowledged by medical professionals).

150. *See* Ann G. Lawthers et al., *Physicians' Perceptions of the Risk of Being Sued*, 17 J. HEALTH POL., POL'Y & L. 463, 468 (1992) (explaining that the surveyed physicians estimated their likelihood of being sued at a percentage much higher than the actual rate).

151. Harvey F. Wachsman, *Ending New York's Malpractice Levy Will Cut Costs*, N.Y. TIMES, Jan. 12, 1993, at A20 (letter to the editor).

152. *See* John J. Fraser, Jr., et al., *Technical Report: Alternative Dispute Resolution in Medical Malpractice*, 107 PEDIATRICS 602, 605 (2001) (observing that many patients injured by negligent care never file a malpractice suit against the provider).

153. *See* Howard B. Beckman et al., *The Doctor-Patient Relationship and Malpractice: Lessons from Plaintiff Depositions*, 154 ARCH. INTERN. MED. 1365, 1365 (1994) (identifying patient-provider communication as one of the crucial factors in determining whether a patient will sue).

strikes a balance between an individual's autonomous choices and a physician's medical expertise—a balance that will further enhance the development of a nonlitigious patient-provider bond.

Physicians contend, however, that the *possibility* of a patient or family bringing either a claim of over-treatment or under-treatment severely hampers their willingness to comply with advance directives,[154] notwithstanding the actual low risk of a suit arising out of medical intervention provided in the face of absent or inadequate end-of-life directives.[155] Arguing that an admittedly low risk of facing a lawsuit is not the same as a non-existent risk, providers may feel it is prudent behavior to retain as much control over the end-of-life medical situation as possible, instead of encouraging patient autonomy.[156] Aside from fear of litigation, physicians may not support individual autonomy in medical decisionmaking because of a personal belief that they are in the best position to make these decisions. It may have been true in the past that physicians possessed both intimate knowledge of the patient's medical and social history, as well as distance from the emotional aspects surrounding the medical decisions. Now, however, the changes in the patient-provider relationship wrought by managed care might make this rationalization suspect.[157] The *Wright* ruling may help encourage greater physician acceptance of patient autonomy because the decision focused on the adequacy of the documentation and communication and not on the education or status of the individual making the medical decisions.

Wright's strict interpretation of the statutory guidelines suggests that courts will support the exercise of individual autonomy so long as those persons have both drafted and communicated clear end-of-life decisions according to the HCDA's statutory guidelines.[158] Short of that, the courts will show deference to the health care providers,

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154. *See* Malloy, *supra* note 111, at 1057-58 (discussing several reasons, including fear of liability, given by physicians to explain a general reluctance to abide by the terms of advance directives).

155. *See* Lawthers et al., *supra* note 150, at 468 (describing how physicians overestimate their actual litigation risk).

156. *See* Levenson, *supra* note 144, at 1153 (discussing how fear of liability may hamper respect for patients' decisions).

157. *See* Thomas Bodenheimer, *The American Health Care System: Physicians and the Changing Medical Marketplace*, 340 N. ENG. J. MED. 584, 586 (1999) (noting a decline in the length of time physicians spend with patients during an office visit, resulting in a negative impact on the patient-physician relationship); *see also* Peter Dewland & Jane Dewland, *At the Coalface, But on the Receiving End*, 25 J. MED. ETHICS 541, 541 (1999) (providing anecdotes told from the viewpoint of a patient and his wife that highlight how quickly the patient-physician relationship can shift toward treating the patient as merely a "thing" at the center of the medical technology).

158. *See Wright*, 353 Md. at 594-95, 728 A.2d at 179.

whose actions mirror the interests of the state in supporting the preservation of life.

c. Wright Delineates the Legislature's Role in Statutory Protection of Individual Autonomy.—The circumstances in *Wright* forced the court to interpret the HCDA without distorting the statute into something contrary to the legislature's intent. Shortly after the passage of the HCDA, Baltimore County Circuit Judge John F. Fader, II, noted that courts were already applying common sense judgments concerning the adequacy of advance directives.[159] However, the problems encountered in *Wright* were not simple technicalities that a court using a practical, common sense approach could overlook.[160] Instead, the plaintiffs—despite Wright's inadequate DNR request, the absence of evidence indicating the existence of a valid oral advance directive arrangement, and the inability to meet the activation criteria drafted into his living will—inferred that the court should read the statutory language as mere suggestions, rather than carefully crafted legislative guidelines.[161] The court declined to do so.[162] However, this does not close the door to a different interpretation of future legislative modifications made to ensure that the HCDA remains in tune with current medical advances.[163] The court's action in *Wright* establishes that since the legislature is free to make statutory changes whenever it sees the need, the court will interpret the HCDA as written until an official modification occurs.[164]

d. Wright *Highlights the Need for Public Education to Ensure Statutory Compliance.*—The *Wright* ruling underscores the public policy importance of providing ongoing education to the public concerning

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159. *See* John F. Fader, II, *The Precarious Role of the Courts: Surrogate Health Care Decisionmaking*, 53 MD. L. REV. 1193, 1208-09 (1994). "Even in cases in which an attending medical practitioner may be reluctant to accept a medical directive document—for example, one that is technically flawed because it contains only one witness signature instead of two—a trial court would most probably give it legal effect." *Id.*; *see also* MD. CODE ANN., HEALTH-GEN. I § 5-602(c)(2)(i) (1994) (amended 2000) (requiring two witnesses for a valid *written* advance directive).

160. *See Wright*, 353 Md. at 568, 728 A.2d at 166. The problems in *Wright* involved failure to reach the threshold medical status required to activate his written advance directive, *id.* at 587-88, 728 A.2d at 175, lack of documentation of an oral advance directive, *id.* at 588-89, 728 A.2d at 176, and miscommunication about the applicability of DNR status for the current hospitalization, *id.* at 589, 728 A.2d at 176.

161. *Id.* at 594, 728 A.2d at 178.

162. *Id.* at 595, 728 A.2d at 179.

163. *See* Hoffmann, *supra* note 135, at 1130 (stating that the passage of the HCDA marks only one milestone in the ongoing efforts to establish end-of-life decisionmaking autonomy for all individuals).

164. *See Wright*, 353 Md. at 594-95, 728 A.2d at 179.

end-of-life decisionmaking.[165] Its outcome was an unnecessary tragedy on several levels. First, the way in which Robert Wright died may not have reflected the choices that he or his family would have preferred.[166] Second, the medical staff provided emergency intervention as required by their jobs, and the gratitude they earned was a lawsuit. If players on both sides of the equation had understood the entire method of creating and disseminating advance directives adequately, it may have been possible to avoid the entire dispute. Although testimony from Robert Wright's mother was contradictory as to exactly what her son had requested, neither side disputed that the decedent clearly had tried to arrange *something* concerning end-of-life issues.[167] He did not adhere to the statutory guidelines, so the court rightfully could not honor his attempted arrangements.[168] Statutory language is difficult for the average individual to locate, understand, and follow. To prevent similar outcomes in the future, Maryland needs to take actions that increase the public's understanding of the responsibilities involved before the need for end-of-life directives arise.

The difficulty with establishing statewide educational programs concerning advance directives is the discomfort surrounding the concept of death.[169] Advance directive educational programs require something different than measures such as the mandatory training and testing required before receiving a driver's license. Unlike the anticipated rite of passage into adulthood signified by obtaining a driver's license, information about advance directives forces individuals to confront the approach of another, less desirable rite of passage. Although death is inevitable, it is not a comfortable topic to discuss.[170]

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165. *See, e.g.*, Byrnes, *supra* note 89, at 56 n.157 (explaining that, by federal and state law, health care facilities are required to inform all individuals admitted to their facilities about their options for end-of-life decisionmaking).

166. *See Wright*, 353 Md. at 580, 728 A.2d at 172. Wright's mother's testimony recounts how once when her son came out of his coma, he repeatedly moaned and called out for her during the last eight days of his life. *Id.*

167. *See id.* at 587-90, 728 A.2d at 175-77.

168. *See id.*

169. *See, e.g.*, Linda Emanuel, *PSDA [Patient Self-Determination Act] in the Clinic*, 21 HASTINGS CEN. REP., Sept.-Oct. 1991, at S6-S7 (stating that although the point of entry into the hospital might seem like an ideal time to bring up end-of-life issues, the topic requires a much longer and more in-depth discussion than that situation allows).

170. *See* J. Randall Curtis & Donald L. Patrick, *Barriers to Communication About End-of-Life Care in AIDS Patients*, 12 J. GEN. INTERN. MED. 736, 738 (1997). Some of these perceived barriers include a patient's fear that talking about death may hasten it, or an unwillingness to involve the physician in a potentially uncomfortable conversation. *Id.*; *see also* Dale G. Larson & Daniel R. Tobin, *End-of-Life Conversations: Evolving Practice and Theory*, 284 JAMA 1573, 1574 (2000) (suggesting that providers avoid conversations about end-of-life issues because they lack the interpersonal skills to address these topics).

The Court of Appeals's ruling in *Wright*, however, shows that it is crucial to have these conversations until each citizen is capable of making or opting not to make choices concerning end-of-life interventions. Although studies indicate that educational attempts have not resulted in any dramatic changes in the percentages of individuals preparing advance directives, even a slight improvement in general awareness is a positive sign.[171] Individual autonomy may be a constitutionally recognized right, but it remains worthless until individuals understand how to invoke it in a manner courts can uphold.

5. Conclusion.—The *Wright* ruling compared Robert Wright's attempts to direct his end-of-life interventions with the express requirements of the HCDA. In so doing, Judge Rodowsky spurned a request by the plaintiffs to take on the impossible task of trying to interpret the unstated and inadequately documented intent of an individual. The resulting decision suggests that those individuals who wish to create enforceable DNR statements or advance directives need to adhere strictly to the requirements outlined in the HCDA. Although this outcome resulted in a less desirable result for Robert Wright's family, the consistency afforded by a bright-line interpretation allows more predictable outcomes than an approach that examines every advance directive attempt on a case-by-case basis. *Wright* upholds the concept of individual autonomy, but reminds individuals that this concept does not simply refer to the right to make end-of-life decisions; responsibility accompanies this autonomy. To invoke the liberty interests provided by the HCDA, an individual must accept the burden of preparing end-of-life documentation in accordance with the legislative guidelines. Failure to accept this burden will severely curtail an individual's ability to enjoy the decisionmaking privileges granted by the provisions of the HCDA.

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171. *See* Mezey, *supra* note 138, at S11 (describing the impact of several community education programs on the community's level of understanding of medical issues, using the Patient Self Determination Act as an example).

X. PROPERTY

A. Clarifying the Law of Artisan's Liens

In *Wallace v. Lechman & Johnson, Inc.*,[1] the Court of Appeals considered whether a consultant, who contracted to sell and install a computer network, committed conversion when he removed the network's server computer from the buyer's office, made repairs to it at his own office, and then refused to return the server, claiming an artisan's lien for the balance due on the sale of the entire network.[2] The court found the seller liable for conversion, holding that no artisan's lien arose under these circumstances because the parties had understood that such repair was part of the seller's performance under the sales contract.[3] In the alternative, the court held that, even if such a lien had arisen, the amount of the lien could not exceed the value of the repair and reinstallation of the computer.[4] Thus, Wallace's demand for payment of the balance due on the entire contract terminated any artisan's lien that may have arisen for repair and reinstallation of the server.[5]

The court began the opinion in *Wallace* by stating: "[i]llustrated here is a lay person's misunderstanding of his legal rights."[6] Given this preface, it is not surprising that what follows is a detailed analysis of artisan's liens. While the court ultimately found that no artisan's lien arose in Wallace's favor, it is the court's interpretation of the Maryland artisan's lien statute that is of primary interest here. Indeed, in light of its explanation of such liens, the court's conclusion is almost axiomatic. In *Wallace*, the Court of Appeals treats statutory artisan's liens as a codification of common-law artisan's liens and analyzes Wallace's claim in light of the common-law principles of possession, intent, and waiver.[7] In the process, the *Wallace* court both clarifies Maryland's law of artisan's liens and adopts an interpretation of artisan's liens that is consistent with other jurisdictions in the United States.

1. The Case.—In June 1992, Lechman and Johnson, Inc., a telecommunications consulting firm (the Firm), decided to place its existing computers on a network, thereby allowing its employees to

1. 354 Md. 622, 732 A.2d 868 (1999).
2. *Id.* at 624, 732 A.2d at 869.
3. *Id.* at 631, 732 A.2d at 873.
4. *Id.* at 631-32, 732 A.2d at 873.
5. *Id.*
6. *Id.* at 624, 732 A.2d at 869.
7. *See id.* at 628-33, 732 A.2d at 871-74.

more efficiently share and store information.[8] The appellee, Peter Lechman, contacted the appellant, Andy Wallace, trading as EZ Computers, and entered into a series of oral agreements (the contract) in which Wallace agreed to provide and install all the equipment necessary to network the Firm's existing computers for $10,271.34.[9] The hardware installed by Wallace included a 486 computer, which acted as the server for the network.[10] Installation began in November 1992, and problems with the network developed almost immediately.[11] According to Lechman, "'[e]ach and every time [Wallace] came back to the office to work on a system, he would solve that problem to an extent but then another problem would pop up.'"[12] Problems with the server's modem were of particular concern to Lechman because they rendered the Firm's computers incapable of sending and receiving faxes.[13] On June 3, 1993, Wallace removed the server from the Firm's office, stating that he was taking it back to his office to make final repairs to the modem.[14]

A few days later, Wallace informed Lechman that repairs to the server's modem were complete and demanded payment of not only the outstanding balance on the contract, but an additional fee of $300 to reinstall the server.[15] Lechman rejected these terms.[16] On August 10, 1993, Wallace wrote Lechman a letter, again demanding payment of the outstanding balance, but lowering the price of reinstallation to $150.[17] In this letter, Wallace again asserted that the Firm owed him $3026.28, but acknowledged that this amount would be reduced by $1000 (the amount of a recent payment by Lechman) when Lechman either faxed him a copy of the canceled check or brought it when he finalized the bill.[18] The letter also warned Lechman that if he failed to pay this amount, the server would be sold on September 1, 1993, "'for the highest offer.'"[19]

In a letter to Wallace dated August 27, 1999, Lechman acknowledged his financial obligation to EZ Computers, but demanded that

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8. *Id.* at 624, 732 A.2d at 869.

9. *Id.*, 732 A.2d at 870. The parties stipulated to an exhibit showing an itemized invoice for this amount dated June 9, 1993. *Id.* at 624-25, 732 A.2d at 870.

10. *Id.* at 625, 732 A.2d at 870.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* In total, Wallace asserted that the Firm owed him approximately $3300. *Id.*

16. *Id.*

17. *Id.* at 626, 732 A.2d at 870.

18. *Id.*

19. *Id.* (emphasis omitted).

the server be returned, suggesting that it was illegal for Wallace to hold the computer "'as collateral for the remaining monies due.'"[20] When Wallace failed to return the computer, the Firm filed suit in the Circuit Court for Prince George's County, alleging that Wallace had converted the computer to his own use, and demanding its "immediate return," along with all associated software and $15,000 in compensatory and punitive damages.[21] Wallace claimed that he lawfully possessed the computer under an artisan's lien against the outstanding balance on the contract.[22] He also counterclaimed for breach of contract, alleging that the Firm had breached its duty under the contract by failing to pay the balance due.[23]

At the subsequent bench trial, the court entered judgment for the Firm on its claim and the counterclaim.[24] The court found that Wallace had breached his duty to provide "a satisfactory computer system in accordance with [the] verbal contract [with the Firm] and therefore [Wallace's] refusal to return the computer amounted to conversion."[25] The court awarded damages in the amount the Firm had paid to Wallace for the purchase and installation of the entire network.[26]

Wallace filed notice of appeal in the Court of Special Appeals.[27] However, prior to consideration by that court, the Court of Appeals, *sua sponte*, issued a writ of certiorari to determine whether Wallace

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20. *Id.*

21. *Id.* at 626-27, 732 A.2d at 870-71. Conversion is "[a]ny unauthorized act which deprives the owner of his property permanently or for an indefinite time." BLACK'S LAW DICTIONARY 261 (abridged 6th ed. 1991); *see also* Saunders v. Mullinix, 195 Md. 235, 240, 72 A.2d 720, 722 (1950) (stating that the "gist of a conversion is not the acquisition of the property by the wrongdoer, but the wrongful deprivation of a person of property to the possession of which he is entitled"). As the court pointed out, if the Firm was truly seeking the return of its computer, it would have filed an action in replevin, by which a plaintiff can recover goods wrongfully detained by a defendant by showing he has a better right to possession than the defendant. *Wallace*, 354 Md. at 627 n.1, 732 A.2d at 871 n.1. In Maryland, the district courts have complete jurisdiction over actions in replevin, regardless of the amount in controversy. *Id.* (citing MD. CODE ANN., CTS. & JUD. PROC. § 4-401(2) (1998)). Based on the relief sought, the court construed the Firm's complaint as sounding in detinue—an action which alleges "that the defendant unjustly detains property described therein to the possession of which the plaintiff is entitled and shall claim the return of the property, or its value, plus damages for its detention." *Id.*

22. *Wallace*, 354 Md. at 627, 732 A.2d at 871.

23. *Id.*

24. *Id.*

25. *Id.* (internal quotation marks omitted) (quoting the circuit court).

26. *Id.* The total amount of the award was $8245 plus prejudgment interest. *Id.*

27. *Id.*

lawfully possessed the server pursuant to an artisan's lien or whether his possession amounted to conversion.[28]

2. Legal Background.—The concept of artisan's liens is codified at section 16-302 of Maryland's commercial law article, which states, in pertinent part: "[a]ny artisan who, with the consent of the owner, has possession of goods for repair, mending, improving, dry cleaning, laundering, or other work . . . has a lien on the goods for the costs of the work done."[29] Prior to this codification, artisan's liens were well established in the common law of Maryland.[30] In fact, the lien of the bailee[31] who has done work upon some chattel in his possession was probably first devised by the courts in response to the failure of early contract law to recognize actions on implied contracts.[32] Maryland's artisan's lien statute is typical of such statutes in other jurisdictions.[33]

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28. *Id.*

29. MD. CODE ANN., COM. LAW II § 16-302 (2000). In broad terms, a lien represents a claim or encumbrance that a creditor has on the property of another as security for the payment of some debt or obligation owed to the former. *See* RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 107, at 505 (2d ed. 1955) (describing the nature and classes of possessory liens). At common law, a lien known as a specific or particular lien allowed a party who had increased the value of some chattel placed in his possession to retain that property until the charge for these improvements was paid. *Id.* § 107, at 509-10. Statutory artisan's liens are a codification of common law specific possessory liens and often extend the lien rights of artisans beyond their common-law boundaries. *Id.* § 107, at 505-06. Many types of specific liens have been codified. Thus, when dealing with specific liens, it is important to look for a statute regulating liens on the item in question. *Id.*

30. *See, e.g.*, Wilson v. Guyton, 8 Gill 167 (1849) (explaining the common-law doctrine of artisan's liens).

31. The Court of Appeals of Maryland defines bailments as "[t]he relation created through the transfer of the possession of goods or chattels, by a person called the bailor to a person called the bailee, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon the goods or chattels are to be dealt with according to the instructions of the bailor." Gen. Ref. Co. v. Int'l Harvester Co., 173 Md. 404, 414-15, 196 A. 131, 135 (1938).

32. BROWN, *supra* note 29, § 107, at 510 ("To partially remedy this injustice, the bailee, where no express contract for payment existed, was allowed to retain possession of the goods until the reasonable value of his services was paid."). Interestingly, at common law, where an express contract for payment did exist, no lien was allowed. *Id.* This distinction between services performed on express and implied contracts lived on after actions on implied contracts were recognized, but was later repudiated by Lord Ellenborough. Chase v. Westmore, 5 M. & S. (K.B.) 180 (1816) (finding that allowing liens only when a price is not fixed, as in the case of an implied contract, had no solid reason); *see also* Olson v. Orr, 145 P. 900, 901 (Kan. 1915) ("It is said that [the common law lien] was provided for the benefit of those with whom no contract had been made . . . .").

33. *See, e.g.*, CAL. CIV. CODE § 3051 (Deering 2000) ("Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof, . . . has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service."); KAN. STAT. ANN. § 58-201 (1999) ("Whenever any person, at or with the owner's request or consent shall perform work . . . on any goods, personal property, chattels . . . , a first and prior lien on such

While these statutes may extend artisan's liens beyond their common-law boundaries, they are generally interpreted in light of common-law principles.[34]

a. Artisan's Lien Statutes Interpreted According to Common-Law Principles.—Many jurisdictions have held that statutory artisan's liens are, in essence, merely declaratory of the common law, and they review claims of artisan's liens in light of common-law principles.[35] In *Quist v. Hill*,[36] the Supreme Court of California explained that, except for those parts of the statute broadening the definition of "artisan" and allowing for the sale of the bailed property in satisfaction of the lien, the statute in question was "in other respects but declaratory of the common-law rule, and the right to a lien must be governed by the same rules which prevailed at common law."[37]

In *Quist*, defendant A.W. Sandman contracted with co-defendant Hill to cut and deliver bark from trees on Hill's property.[38] Sandman hired Quist and co-plaintiff Michael to do the actual stripping of the bark from the trees.[39] Sandman abandoned the contract after delivering only part of the required quantity of bark, leaving Quist and Michael uncompensated for their labor in stripping an additional 235 cords of tan bark, which remained in their possession.[40] The court held that Quist and Michael could not assert a lien against Hill on the bark in their possession under the California artisan's lien statute because at common law such a lien could only be asserted by an artisan "with whom the owner directly contracts."[41] The court further held that, while the California code did indeed extend the right to such liens to more artisans than the common law, it was otherwise merely

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personal property is hereby created in favor of such person . . . [for] the full amount and reasonable value of the services performed.").

34. *See, e.g.*, Quist v. Hill, 99 P. 204, 207-08 (Cal. 1908) (finding that statutory artisan's liens must be governed by the same rules that prevailed at common law); Nat'l Bank of Joliet v. Bergeron Cadillac, Inc., 361 N.E.2d 1116, 1117 (Ill. 1977) (interpreting a repairman's lien statute as an additional component of the common-law artisan's lien); Northeast Kan. Prods. Credit Assoc. v. Ferbrache, 693 P.2d 1152, 1155-56 (Kan. 1985) (treating the state statutory veterinarian's lien for services as a possessory lien according to the principles of common-law possessory liens by finding that the veterinarian only possessed a lien for services provided to the 85 head of cattle actually in his possession); *see also* BROWN, *supra* note 29, § 107, at 505-06.

35. *See supra* note 34 (citing several cases where courts have treated the statutory lien similar to the common-law possessory lien).

36. 99 P. 204 (Cal. 1908).

37. *Id.* at 208.

38. *Id.* at 205, 207.

39. *Id.*

40. *Id.*

41. *Id.* at 208.

declaratory of the common law and "can only be asserted under the same circumstances and conditions as it could be asserted at common law."[42] Thus, statutes expanding the common-law right to an artisan's lien do not eliminate or modify other common-law requirements not addressed in the statute.[43] The *Quist* defendants were able to fit themselves within the statute's expanded definition of "artisan."[44] They failed, however, to meet the common-law requirement of privity, which was not addressed in the statute.[45]

Similarly, in *Donegan v. Meredith*,[46] the Court of Appeals of Maryland also reached the conclusion that possessory lien statutes are declaratory of the common law.[47] Under Chapter 23 of the Acts of 1949, Meredith, a veterinarian, sold a race horse belonging to Donegan, in satisfaction of charges related to the care of several of Donegan's horses.[48] Proceeds from the sale of the horse, however, did not satisfy the charges, and Meredith sued Donegan for the remaining balance.[49] Having lost at trial, Donegan appealed, arguing that, because the statute did not expressly preserve the right to sue for the debt secured by the lien, enforcing the lien destroyed such right.[50] However, the court found that "[t]his contention is in the teeth of the words and the purpose of the act. The act is declaratory of (and perhaps enlarges) the common law lien of the bailee . . . ."[51] The expansion by statute of the common-law lien did not destroy the right to sue on a debt.[52] Thus, while possessory lien statutes may modify the common law, they do not "destroy the obvious by not mentioning it needlessly."[53]

In keeping with the interpretation of artisan's lien statutes as merely embracing the common law, most jurisdictions, including Maryland, have held that such statutes do not abrogate the common law, but are in addition to it.[54] For example, in *Winton Co. v. Meister*,[55] a

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42. *Id.*

43. *See* BROWN, *supra* note 29, § 108, at 515 (asserting that the better rule of interpretation of these statutes is that they are not merely declaratory of the common law, "but intend to confer a lien in those instances where the common law failed to grant one").

44. *See Quist*, 99 P. at 207.

45. *See id.* at 208.

46. 199 Md. 152, 86 A.2d 93 (1952).

47. *Id.* at 155, 86 A.2d at 94.

48. *Id.* at 154, 86 A.2d at 94.

49. *Id.*

50. *Id.* at 155, 86 A.2d at 94.

51. *Id.* (citation omitted).

52. *Id.* at 156, 86 A.2d at 94.

53. *Id.*, 86 A.2d at 95.

54. *See, e.g.*, Nat'l Bank of Joliet v. Bergeron Cadillac, Inc., 361 N.E.2d 1116, 1117 (Ill. 1977) (interpreting Illinois's repairman's lien statute as a codification of the common-law

case dealing with the existence of a lien for the repair of an automobile prior to the recognition of such a lien by statute, the Court of Appeals of Maryland stated that, "[w]hile there is no statute, in this state, creating a repairman's lien for repairs to an automobile, it is clear that a common-law lien would exist on such property until the charges for the labor and expenses are paid."[56] Thus, not only are statutory liens interpreted according to common-law principles, they exist in addition to common-law liens. Given their dependence on the common law, understanding statutory artisan's liens requires a review of the fundamental principles of common-law artisan's liens.

b. The Common-Law Doctrine of Artisan's Liens.—In 1849, the Court of Appeals of Maryland announced the doctrine of common-law artisan's liens in the case of *Wilson v. Guyton*.[57] In this case, Chief Judge Dorsey stated that "wherever the party has, by his labor or skill . . . improved the value of property placed in his possession, he has a lien upon it until paid."[58] The court further explained that such liens may be either expressly created or may arise by implication when, "from the nature of the transaction, the owner of the property is assumed as having designed to create them, or when it can be fairly inferred, from circumstances, that it was the understanding of the parties that they should exist."[59] Thus, Maryland recognizes three fundamental elements of artisan's liens: (1) possession of the chattel by the artisan; (2) improvement of the chattel through the labor of the artisan; and (3) an express or implied intention by the parties to create such a lien. These elements, at least in some combination, are also required in many other jurisdictions.[60]

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artisan's lien and stating that liens created by statutes "shall be in addition to, and shall not exclude, any lien existing by virtue of common law"); Winton Co. v. Meister, 133 Md. 318, 320, 105 A. 301, 302 (1918) (finding that, in the absence of a statute creating the right to a lien, a common-law lien may still exist).

55. 133 Md. 318, 105 A. 301 (1918).

56. *Id.* at 320, 105 A. at 302.

57. 8 Gill 213 (1849).

58. *Id.* at 215.

59. *Id.*

60. *See, e.g.*, McDougall v. Crapon, 1886 N.C. LEXIS 257 (requiring possession of the chattel in order to assert an artisan's lien); Mack Trucks, Inc. v. Performance Assocs. Corp., 553 A.2d 412, 414 (Pa. 1989) (holding that assertion of a common-law artisan's lien requires some improvement of the chattel in question); Meyers & Bros. v. Brates-piece, 34 A. 551, 551 (Pa. 1896) (defining common-law artisan's liens as requiring possession and improvement of the chattel in question, as well as express or implied consent from the owner of the chattel for the work to be done); *see also* BROWN, *supra* note 29, § 108, at 511-26 (discussing the elements of common-law artisan's liens).

(1) The Requirement of Possession.—Artisan's liens are dependent upon possession and are extinguished when the property subject to the lien is voluntarily surrendered.[61] In *Patapsco Trailer Service & Sales, Inc. v. Eastern Freightways, Inc.*,[62] the Court of Appeals of Maryland considered whether a mechanic, who had surrendered a refrigerated trailer to its owner after making repairs, lost his lien against the trailer for the cost of those repairs.[63] Eastern Freightways became the owner of the trailer after the previous owner had given it to Patapsco for repairs.[64] Eastern persuaded Patapsco to release the trailer.[65] However, when Eastern failed to pay the repair bill, Patapsco sent an employee with a tractor to retrieve the trailer.[66] The employee, without Eastern's permission, hooked up the trailer and hauled it back to Patapsco's premises, where it was held until payment of the balance due for the repairs.[67]

The court concluded that any lien that Patapsco had on the trailer was founded on the common law.[68] Emphasizing the possessory nature of artisan's liens, the court held that "such a lien—being dependent upon possession—was waived or lost when the lienholder voluntarily and unconditionally parted with possession or control of the property to which the lien had attached; thus, the lien could not

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61. *See* Jess H. Young & Son, Inc. v. Victory Tool & Die Co., 11 Cal. Rptr. 516, 518 (Cal. Dist. Ct. App. 1961) (explaining that a possessory lien on personal property is "dependent upon possession of such property by the lien claimant . . . [and] terminates when possession is voluntarily relinquished"); Northeast Kan. Prods. Credit Assoc. v. Ferbrache, 693 P.2d 1152, 1154 (Kan. 1985) ("If the lien claimant voluntarily delivered possession of the personal property to the owner, the lien was deemed to be extinguished."); Welcome Home Ctr., Inc., v. Cent. Chevrolet Co., 249 S.E.2d 896, 896 (S.C. 1978) ("[U]nder the common law, the vitality of a repairman's lien is conditioned on his continuous possession of the article."); Shaw v. Webb, 174 S.W. 273, 273 (Tenn. 1915) (stating, in a case involving subsequent relinquishment of possession, "we are not dealing with a claim . . . to the artisan's common-law lien which depends for validity . . . upon the retention of possession"); *see also* BROWN, *supra* note 29, § 108, at 512 ("Although the value of the chattel may be improved by [the artisan's] labor, he has no common-law lien thereon unless the possession of the goods resides in him.").

62. 271 Md. 558, 318 A.2d 817 (1974).

63. *Id.*

64. *Id.* at 559, 318 A.2d at 818.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 564, 318 A.2d at 820. The court in *Patapsco* first determined that the trailer did not fall within the meaning of "motor vehicle" as defined by MD. ANN. CODE art. 63, § 41 (1972), which specially addresses liens on boats, aircrafts, and motor vehicles and provides for the continuation of a lien after surrender or delivery of the property. *See Patapsco*, 271 Md. at 563, 318 A.2d at 820-21. Thus, the court determined that the asserted lien on the trailer was only valid if it met the requirements of common-law artisan's liens. *Id.*

be restored thereafter by resumption of possession."[69] Therefore, as illustrated by *Patapsco*, common-law artisan's liens are valid only when the artisan has continuing possession of the item in question from the time the work is performed until the time the artisan is paid for that work.

The *Patapsco* court also discussed an important corollary to the surrender of possession rule: once an artisan's lien is extinguished by surrender of the chattel, it cannot be reinstated by subsequent repossession of that chattel.[70] Other jurisdictions have reached the same conclusion.[71] For example, in *Welcome Home Center, Inc. v. Central Chevrolet Co.*,[72] the Supreme Court of South Carolina considered whether a mechanic could assert a lien on a truck for services previously performed on the same vehicle when he had already relinquished possession to the owner.[73] Welcome Home Center (the Center) took its vehicle to Central Chevrolet (Central), which, after making repairs, released the car to the Center prior to receiving payment for its services.[74] The Center subsequently brought the vehicle back to Central for different repairs, for which it paid in full.[75] Central, however, refused to release the truck until it was paid for work that it had previously performed on the vehicle.[76] In concluding that Central was not entitled to claim a lien for its previous work, the court stated that "under the common law, the vitality of a repairman's lien is conditioned on his continuous possession of the article."[77] However, not every surrender of possession will extinguish a possessory lien.

(i) Conditional Surrender of a Chattel Subject to an Artisan's Lien.—When an artisan conditionally surrenders the chattel in ques-

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69. *Id.* at 563, 318 A.2d at 821.

70. *Id.* at 564-65, 318 A.2d at 821.

71. *See, e.g.*, Welcome Home Ctr., Inc. v. Cent. Chevrolet Co., 249 S.E.2d 896, 896 (S.C. 1978) (holding that a garage's prior lien for previous repair work expired after relinquishing possession of a vehicle, even though the garage had subsequently repossessed the vehicle to make further repairs). This situation is distinguishable, however, from the case where an artisan does work on several items under the same agreement. *See* Braufman v. Hart Publ'n, Inc., 48 N.W.2d 546, 551 (Minn. 1951) (holding that a printer may attach a lien on both printed and blank paper in its possession as security for the entire amount due for printing on only a portion of the paper); BROWN, *supra* note 29, § 108, at 525. In such cases, the artisan may surrender all but one of the items and still maintain a lien on the remaining item for the amount of the work done on all items. BROWN, *supra* note 29, § 108, at 525.

72. 249 S.E.2d 896 (S.C. 1978).

73. *Id.* at 896.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

tion, he may reassert his lien when he regains possession of the chattel.[78] Conditional surrenders usually occur when there is an express agreement between the artisan and the party taking possession of the chattel that such chattel will be returned.[79]

In *Winton Co. v. Meister*,[80] the Court of Appeals of Maryland considered whether a mechanic lost his common-law lien for repairs to an automobile when it was temporarily removed from his garage.[81] Meister claimed a lien on an automobile for repairs.[82] In the course of these repairs, the car was removed from his garage and taken to his uncle's shop to be measured for new upholstery.[83] The car was promptly returned to Meister.[84] In a dispute with Winton Co. over the priority of a lien for the amount due on the sale of the car and Meister's artisan's lien, Winton Co. argued that Meister had lost his lien when he surrendered possession of the car to the upholsterer.[85] Citing the fact that the car was released on the condition that it be returned only to Meister and that the upholsterer had possession for only about one hour, the court held that, under these circumstances, Meister's lien had not been extinguished.[86]

Similarly, in *Jess H. Young & Son, Inc. v. Victory Tool & Die Co.*,[87] the California Court of Appeals indicated that an artisan's lien is not lost when the parties agree to restore the lien upon the artisan's repossession of the chattel.[88] In *Young*, Nolan Wade, the owner of a cotton-picking machine, delivered the machine to Victory Tool & Dye Co. (Victory) for an overhaul.[89] Upon completion of the overhaul, Wade signed a note as security for payment of the repair costs, where-

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78. *See* Jess H. Young & Son, Inc. v. Victory Tool & Die Co., 11 Cal. Rptr. 516, 518 (Cal. Dist. Ct. App. 1961) (requiring possession to be "voluntary relinquished" in order for a lien to terminate); Church of Bible Understanding v. Bill Swad Leasing Co., 442 N.E.2d 78, 80 (Ohio Ct. App. 1981) (stating that "the surrender of possession must be voluntary, for if the lien claimant is improperly deprived of his possession, as, for instance, by fraud, . . . the lien is not lost" (quoting 34 OHIO JURISPRUDENCE 2D 423, *Liens* § 13 (1958))).

79. *See* BROWN, *supra* note 29, § 121, at 599 ("[I]t is possible for a lienor to surrender goods in his possession to his debtor subject to an agreement that the former's right of lien shall continue and be considered not waived.").

80. 133 Md. 318, 105 A. 301 (1918).

81. *Id.* at 321, 105 A. at 302.

82. *Id.* at 319, 105 A. at 301.

83. *Id.* at 321, 105 A. at 302.

84. *Id.*

85. *Id.*

86. *Id.* at 322, 105 A. at 302.

87. 11 Cal. Rptr. 516 (Cal. Dist. Ct. App. 1961).

88. *Id.* at 518.

89. *Id.* at 517.

upon Victory released the cotton-picker to Wade.[90] When Wade subsequently returned the picker to Victory for further work, Victory refused to release the machine until Wade paid for both the prior overhaul and the additional work.[91] The court held that a mechanic who unconditionally surrendered a machine to its owner could no longer claim a lien for repairs made to that machine.[92] While the court concluded that an artisan's lien could be preserved by such an agreement, it determined that the release of the picker to Wade in exchange for the note could not support a finding that such release was "under such conditions as would revive the lien when possession was restored in [Victory]."[93]

(ii) Involuntary Loss of Possession by the Lienor.—Just as a conditional surrender of the lien property will not extinguish an artisan's lien, nor will involuntary loss of possession by the lienor.[94] In *Church of Bible Understanding v. Bill Swad Leasing Co.*,[95] the Ohio Court of Appeals considered whether an aviation mechanic could retain a lien for repairs and maintenance on an airplane when he was deceived by the owner into releasing the plane.[96]

Bill Swad owned a plane, which he leased to the Church of Bible Understanding [97] Under the terms of the lease, the plane was delivered to Beckett Aviation Corp. for maintenance and repairs.[98] Upon completion of the work, Beckett refused to release the plane until Swad paid for the work.[99] Swad paid Beckett by check and Beckett released the plane.[100] However, four days later, Beckett learned that Swad had stopped payment on the check.[101] When Swad brought the plane to Beckett for additional maintenance, Beckett reasserted his lien for the previous maintenance and repair work.[102]

The Court of Appeals of Ohio held that Beckett had a lien for repairs prior to its release of the plane to Swad and that this lien was

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90. *Id.*
91. *Id.* at 518.
92. *Id.* at 518-19.
93. *Id.* at 519.
94. *See* BROWN, *supra* note 29, § 121, at 598 ("[I]t is obvious that between the parties at least, the lien is not lost if the goods are taken from the bailee's possession without his consent, either by force, stealth, or fraud.").
95. 442 N.E.2d 78 (Ohio Ct. App. 1981).
96. *Id.* at 79-80.
97. *Id.* at 79.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

not extinguished when he released the plane upon tender of Swad's check.[103] In reaching this conclusion, the court indicated that "the surrender of possession must be voluntary, for if the lien claimant is improperly deprived of his possession, as, for instance by fraud, . . . the lien is not lost."[104] The court found that the issuance of the check by Swad, who intended to stop payment at the time he tendered the check, was a fraudulent act, and Beckett's surrender of possession did not destroy its lien on the plane.[105]

(2) Improvement of the Chattel.—An artisan may assert a lien on a chattel only to the extent that he has improved or otherwise done work on the chattel.[106] For example, in *Mack Trucks, Inc. v. Performance Associates Corp.*,[107] the Superior Court of Pennsylvania addressed the question of whether a computer software company had enhanced the value of certain items in its possession so that it could claim a lien on those items.[108] Mack Trucks, Inc. (Mack) contracted with Performance Associates Corp. (Performance) to develop computer software for use in its sales operations.[109] To aid in the development of this software, Mack gave Performance possession of a modem, its old software, and an operations manual.[110] After many delays and disagreements over costs, Mack terminated the contract and demanded the return of the items.[111]

Explaining the principle that artisan's liens arise only "when work has been performed on a chattel or materials have been added to a chattel, thereby increasing the chattel's value," the court held that Performance was not entitled to an artisan's lien, because it failed to

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103. *Id.* at 80.

104. *Id.* (quoting 34 OHIO JURISPRUDENCE 2D 423, *Liens* § 13 (1958).

105. *Id.*

106. *See, e.g.*, Am. Consumer, Inc. v. Anchor Computers, Inc., 402 N.Y.S.2d 734, 735 (N.Y. Sup. Ct. 1978) (finding that a computer company could claim a lien for enhancing the value of magnetic computer tapes after creating the tapes by data manipulation, modification, and assembly); Mack Trucks, Inc. v. Performance Assocs. Corp., 553 A.2d 412, 414 (Pa. Super. Ct. 1989) (stating that an artisan's lien arises when "work has been performed on a chattel or materials have been added to a chattel, thereby increasing the chattel's value" (citing Assocs. Fin. Servs. Co. v. O'Dell, 417 A.2d 604 (Pa. 1980)); *see also* BROWN, *supra* note 29, § 108, at 516 (noting that the common-law uniformly confers a lien after a bailee adds value to a chattel, at the request of a bailor, through his labor, skill, or materials).

107. 553 A.2d 412 (Pa. Super. Ct. 1989).

108. *Id.* at 414.

109. *Id.* at 412.

110. *Id.* at 412-13.

111. *Id.* at 413.

add any value to the modem, the old software, or the operations manual.[112]

The Supreme Court of New York also addressed this issue in *American Consumer, Inc. v. Anchor Computers, Inc.*[113] Anchor Computers, Inc. (Anchor) was given computer tapes containing the names, addresses, and other data of American Consumer, Inc.'s (American) customers for the purpose of rearranging this information into a more useful form.[114] The court found that, because such manipulation of data enhanced the computer tapes, Anchor could claim a lien on the tapes.[115]

(3) The Intent of the Parties to Create a Lien.—An artisan who expends labor on some chattel may only claim a lien against that chattel when it was bailed to him for that particular purpose.[116] Such intent in establishing a lien may be either express or implied from the nature of, or circumstances surrounding, the transaction.[117] For example, in *Wilson v. Guyton*,[118] the Court of Appeals of Maryland stated that a lien in favor of a finder could be implied when the owner of lost property offers a reward for the return of that property.[119] However, the court explained that, in the absence of a fixed or certain reward, no such lien arises because, "[t]o the bailee thus in possession of property, such a lien would rarely be valuable, except as a means of oppression and extortion."[120] Thus, *Guyton* illustrates that courts will

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112. *Id.* at 414.

113. 402 N.Y.S.2d 734 (N.Y. Sup. Ct. 1978).

114. *Id.* at 734-35. Specifically, Anchor was to manipulate the data so that it would be "capable of providing the names and addresses of purchasers of books; the subject matters thereof purchased, the date of last purchase . . . and so on." *Id.*

115. *Id.*

116. *See* Assocs. Fin. Servs. Co., Inc. v. O'Dell, 417 A.2d 604, 606 (Pa. 1980) (holding that a towing company could not assert a lien against a tractor for the cost of towing where the owner of the tractor never consented to the services provided). The court emphasized that "[p]ossessory liens are fundamentally consensual in nature, arising from an agreement, either express or implied, between the owner of the goods and the artisan who renders services for those goods." *Id.*

117. *See* Wilson v. Guyton, 8 Gill 167, 168 (1849) ("Liens have been implied when, from the nature of the transaction, the owner of the property is assumed as having designed to create them, or when it can be fairly inferred, from the circumstances, that it was the understanding of the parties that they should exist.").

118. 8 Gill 167 (1849).

119. *Id.* at 168-69. Guyton lost a horse in July of 1847 and, by advertisement, offered a "liberal reward" to anyone who returned the horse. *Id.* at 169. Pearce found the horse and offered to return it to Guyton for three dollars. *Id.* In the meantime, Wilson kept the horse as Pearce's agent. *Id.* at 168. Guyton sued for return of the horse. *Id.* The trial court instructed the jury that Pearce had no right to retain the horse until the reward was paid and directed a verdict in Guyton's favor. *Id.* at 169.

120. *Id.* at 169.

closely examine the facts of each case to determine whether the parties, through their words or actions, intended a lien to exist.

c. Extinguishment of Artisan's Liens.—Artisan's liens are usually extinguished when the owner of the item subject to the lien tenders the debt secured by the lien or when the artisan claiming the lien waives such tender.[121] When an artisan refuses to accept a tender of payment for the lawful charges against the property, or claims a lien for an excessive amount, his claim of lien is waived.[122]

The general rule is that "the owner must make a demand for his property accompanied by a tender."[123] If such tender for the lawful charges against the property is refused, the lien is lost and the lienor may not use his lien as a defense in an action by the owner to replevy the property.[124]

In *Brown v. Dempsey*,[125] the Supreme Court of Pennsylvania considered the question of what constitutes tender of payment so as to discharge an artisan's lien.[126] The defendants, John and Flora Dempsey, had possession of Brown's twenty-horsepower steam boiler for the purpose of making repairs.[127] A dispute over the charges arose in which the plaintiff claimed that Dempsey had demanded $185, an amount far in excess of the work's value.[128] The lower court found that Dempsey could lawfully claim a lien on the boiler for $93 and

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121. *See* Int'l Harvester Co. v. Mahacek, 705 S.W.2d 603, 605 (Mo. Ct. App. 1986) (explaining that "payment or tender of payment . . . discharges the lien and ends the right to possession" (citation omitted)); Segars v. Classen Garage & Serv. Co., 612 P.2d 293, 295 (Okla. App. 1980) ("A proper and sufficient tender of payment operates to discharge a lien"); RESTATEMENT (SECOND) OF THE LAW OF SECURITY § 78 (1941) ("Where the bailor pays the demand secured by a possessory lien, tenders payment, or tender is waived by words or conduct of the lienor, the lien is terminated"); *see also* BROWN, *supra* note 29, § 122, at 604 (explaining that "on the payment of [a] debt the lienor no longer has the right to hold his debtor's goods"). In general, tender of payment "is an unconditional offer by a debtor to pay a sum of money not less than the amount due on the obligation." Collision Ctr. Paint & Body, Inc. v. Campbell, 773 S.W.2d 354, 357 (Tex. App. 1989). In the context of liens, an offer is unconditional when the debtor is ready and able to pay the lienor the entire amount due. *Id.*; *see also* Johnson v. Moore, 931 S.W.2d 191, 195 (Mo. Ct. App. 1996) (noting that a tender "comprehends a readiness and willingness to perform").

122. BROWN, *supra* note 29, § 122, at 604.

123. Enfield v. Huffman Motor Co., 257 P.2d 458, 462 (Cal. Dist. Ct. App. 1953).

124. BROWN, *supra* note 29, § 122, at 605.

125. 95 Pa. 243 (1880).

126. *Id.* at 245.

127. *Id.*

128. *Id.* at 246.

that Brown's highest offer of payment was $65.[129] Given these facts, the lower court found in favor of Dempsey.[130]

In reviewing the case, the Supreme Court of Pennsylvania stated the rule that "the bailor cannot maintain replevin for goods left by him with a tradesman for manufacture, without first discharging the lien which the tradesman has acquired . . . by payment or tender of the amount due."[131] The court held that the plaintiff was not entitled to recover the boiler, because he "tendered but $65; a sum short of that necessary to discharge the lien."[132] However, in dicta, the court stated that, had the lower court found that Dempsey demanded an excessive amount, he would not be able to "defend on the ground that the action of replevin [was] prematurely brought."[133] The court warned that "when [an artisan] attempts to use [the lien] as an instrument of extortion, the reason upon which it depends fails, and, as a consequence, the lien itself fails."[134]

Where there has been no actual tender of payment by the owner of the item subject to the lien, an artisan's lien for an excessive amount remains intact.[135] For example, in the case of *Goodman v. Anglo-California Trust Co.*,[136] the California District Court of Appeal considered whether a mechanic who claimed a lien for repairs on a car in an excessive amount retained his lien in the absence of any tender of payment by the owner of the car.[137] In *Goodman*, a mechanic asserted a lien on an automobile in the amount of $165—the sum of $110 from work done on the car previously and $55 for current repairs.[138] The court held that the mechanic was only entitled to a lien on the car for the latter charge of $55 because the lien for the $110 charge was lost upon the previous surrender of the car.[139] However, the owner of the car never tendered the $55.[140] In this situation, the

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129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See* Goodman v. Angelo-California Trust Co., 217 P. 1078, 1080 (Cal. Ct. App. 1923) (explaining that, in the absence of tender of payment, the owner's rights are not prejudiced by an excessive demand); Folsom v. Barrett, 62 N.E. 723, 724 (Mass. 1901) (stating that, in the absence of tender, "the fact that the demand is excessive does not ordinarily relieve the debtor from the necessity of making a tender"); BROWN, *supra* note 29, § 122, at 604.
136. 217 P. 1078 (Cal. Dist. Ct. App. 1923).
137. *Id.* at 1079.
138. *Id.* at 1080.
139. *Id.*
140. *Id.*

court held that "the rights of the lien claimants were not prejudiced in any way by this mistaken demand, in the absence of any tender . . . of the actual amount due."[141]

However, when the lienor makes it clear, either by words or conduct, that tender of the lawful amount due will not result in release of the property, no tender is required and the lien is terminated.[142] For example, in the case of *International Harvester Co. v. Mahacek*,[143] decided by the Missouri Court of Appeals, Mahacek offered to pay $4469.58 in cash to International Harvester (Harvester) for repairs to his truck—the amount quoted to him in an estimate.[144] Tender of this payment in cash would have required him to borrow money from his brother.[145] Harvester refused to release the truck for less than $6900.[146] At trial, the jury found that the parties had agreed upon the lower price for repair of the truck and awarded damages to Mahacek for its wrongful detention.[147] Harvester appealed, claiming that it lawfully possessed the truck pursuant to an artisan's lien.[148] Citing the necessity for Mahacek to borrow money to pay the cost of repairs, Harvester argued that, as a matter of law, its lien was still in force because Mahacek lacked the present ability to pay, and thus his offer was not a proper tender.[149] However, the court held that, because Harvester "made it abundantly clear a tender of any sum less than $6900 would be rejected," it waived its right to tender.[150] As the court stated, Harvester waived its lien because the law does not require a person to tender payment "when such [tender] would be 'a vain and idle ceremony.'"[151]

Thus, artisan's liens are typically extinguished by the occurrence of one of three events: (1) tender of payment by the owner of the item subject to the lien; (2) an unconditional demand for excessive payment by the artisan; or (3) waiver of tender by the artisan. As a general rule, an artisan's lien is extinguished when the amount owed for work on the item subject to the lien is tendered to the artisan. Even

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141. *Id.* (citation omitted).

142. *See, e.g.*, Int'l Harvester Co. v. Mahacek, 705 S.W.2d 603, 604 (Mo. Ct. App. 1986); RESTATEMENT (SECOND) OF THE LAW OF SECURITY § 78 (1941).

143. 705 S.W.2d 603 (Mo. Ct. App. 1986).

144. *Id.* at 604.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 605.

150. *Id.*

151. *Id.* (quoting Owens v. Auto. Recovery Bureau, Inc., 544 S.W.2d 26, 31 (Mo. Ct. App. 1976)).

when there is a dispute as to the lawful amount owed, until the payment is tendered to the artisan, the lien remains intact. Demand for excessive payment and waiver are essentially exceptions to this general rule. Thus, when an artisan unconditionally demands an excessive payment or waives any payment at all, the lien is extinguished, even when there has been no tender of payment.

3. The Court's Reasoning.—In *Wallace v. Lechman & Johnson, Inc.*, the Court of Appeals of Maryland held that Wallace was not entitled to claim a lien on the server against the unpaid portion of the invoice for the entire network.[152] The court advanced several grounds in support of this conclusion. First, Wallace's previous surrender of the server extinguished any lien on its unpaid purchase price.[153] Second, the court concluded that when Wallace removed the server from the Firm, both parties understood that this repair constituted continuing performance under their contract.[154] Thus, the requisite intent of the parties to create a lien was absent.[155] Finally, Wallace waived any lien he may have had for the cost of the server's reinstallation when he refused to release the computer for less than the unpaid balance of the purchase price.[156] Noting the possession requirement of artisan's liens, the court rejected any possibility that Wallace had a lien on the computer for the balance of its purchase price.[157] Once Wallace gave possession of the computer to the Firm, all claims to a lien on the computer for its purchase price were lost.[158]

The court then considered whether Wallace had a lien on the computer for the cost of repairs to the modem.[159] For this consideration, the court assumed that an artisan can include a charge for reinstallation in the price of the repair.[160] However, in this situation, the court viewed the modem repair work as part of the ongoing contractual relationship between the parties.[161] Thus, Wallace gained possession of the computer as part of "his attempt to make the goods conform with the contract."[162] The court concluded that, when a bailee takes possession of personal property, "[a]bsent circumstances

152. *Wallace*, 354 Md. at 633, 732 A.2d at 874.
153. *Id.* at 629, 732 A.2d at 872.
154. *Id.* at 631, 732 A.2d at 873.
155. *Id.*
156. *Id.* at 631-32, 732 A.2d at 873.
157. *Id.* at 627, 732 A.2d at 871.
158. *Id.* at 629, 732 A.2d at 872.
159. *Id.* at 631, 732 A.2d at 873.
160. *Id.* at 630-31, 732 A.2d at 873.
161. *Id.* at 631, 732 A.2d at 873.
162. *Id.*

indicating an obligation to pay on the part of the bailor, no lien arises."[163]

Finally, the court explained that Wallace had waived the only plausible lien he might have claimed.[164] The court observed that Wallace demanded $150 to reinstall the server only if the Firm chose to have him reinstall it.[165] However, Wallace refused to surrender the server until the balance of the purchase price was paid.[166] The court concluded that "[u]nder these circumstances the Firm had no obligation to tender $150, and Wallace's possible claim for an artisan's lien for $150 was terminated."[167]

Since Wallace had no artisan's lien on the server, the court concluded that he was liable for conversion.[168] Citing the rule that conversion of part of a chattel may result in conversion of the entire chattel if the part converted destroys or seriously impairs the chattel's utility or value,[169] the court affirmed the circuit court's award of damages to the Firm based on the total value of the entire network.[170] Thus, Wallace's liability for conversion totaled $8245 rather than $2100, the value of the server alone.[171]

4. Analysis.—In reaching its holding that Wallace was not entitled to claim a lien on a server for the balance due on its sale price, the *Wallace* court interpreted the Maryland artisan's lien statute as merely codifying and extending the common law of artisan's liens.[172] This interpretation is consistent with that of many other jurisdictions.[173] Unfortunately, the court never expressly stated this rule of interpretation and offered only a vague attempt to harmonize statutory and common-law artisan's liens. Thus, while a logical interpretation of *Wallace* is that statutory artisan's liens are to be interpreted according to common-law principles, at the very least, *Wallace* provides a basic analysis of intent, possession, and waiver as they relate to the validity of common-law artisan's liens.

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163. *Id.*

164. *Id.* at 631-32, 732 A.2d at 873.

165. *Id.* at 631, 732 A.2d at 873.

166. *Id.*

167. *Id.* at 631-32, 732 A.2d at 873.

168. *Id.* at 633, 732 A.2d at 874.

169. *Id.* at 634, 732 A.2d at 874-75 (citing F.V. HARPER ET AL., THE LAW OF TORTS § 2.37 (1996)).

170. *Id.* at 636, 732 A.2d at 876.

171. *Id.* at 627, 635, 732 A.2d at 871, 875.

172. *See generally id.* at 627-36, 732 A.2d at 871-76.

173. *See supra* note 34.

a. Maryland's Artisan's Lien Statute Codifies the Common Law of Possessory Liens.—Many jurisdictions, in construing artisan's lien statutes, explicitly state that, while these statutes expand the classes of artisans who may assert such a lien, they are otherwise interpreted according to common-law principles.[174] The *Wallace* court could have explicitly reached the same conclusion.[175] In fact, the opinion of the court includes all the information necessary for such an analysis.[176] However, rather than explicitly engaging in statutory interpretation and reaching this conclusion, the court merely stated that the statutory provision allowing an artisan to assert a lien only to the extent of the cost of the work done is consistent with the common law.[177] While this statement is true, it is not an adequate substitute for a more clear and comprehensive interpretation of the artisan's lien statute. The amount of the lien was only one of the claims disputed by the parties in *Wallace.* Possession, tender, and waiver were also at issue.[178] Thus, failing to reach a general conclusion that the Maryland artisan's lien statute should be interpreted according to common-law principles might lead to confusion as to whether the court analyzed Wallace's lien under the statute or the common law.

Questions may arise relating to the court's exclusive use of common-law precedents to analyze Wallace's lien without ever relating

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174. *See supra* note 34.

175. A comparison of the language of Maryland's common-law lien doctrine and the artisan's lien statute reveals that they are, in substance, virtually identical. *Compare* MD. CODE ANN., COM. LAW II § 16-302 (2000) (stating that "[a]ny artisan who, with the consent of the owner, has possession of goods for repair . . . has a lien on the goods for the costs of the work done"), *with* Wilson v. Guyton, 8 Gill 167, 168 (1849) (stating that "wherever the party has, by his labor or skill, . . . improved the value of property placed in his possession, he has a lien upon it until paid"). The *Wallace* court actually alludes to this point when it states that the statutory limitation of the amount of the lien to the cost of the work done is consistent with the common law. *Wallace*, 354 Md. at 628-29, 732 A.2d at 872. Taking the court's observations a step further, the statutory requirements of possession and improvement of the item subject to the lien are also consistent with the common-law doctrine. The legislature could have modified these requirements in the artisan's lien statute, and indeed has done so in other lien statutes, but instead chose to remain silent. *See* MD. CODE ANN., COM. LAW II § 16-204 (1972) (stating that surrender of a motor vehicle, aircraft, boat, or motor home "does not discharge the lien against the owner or a third party who has notice of the lien"). Thus, even though the court failed explicitly to equate the requirements of statutory artisan's lien to those of common-law artisan's liens, this interpretation is plausible, consistent with other jurisdictions, and seems to be the most logical interpretation of the court's opinion.

176. *See Wallace*, 354 Md. at 627-32, 732 A.2d at 871-74.

177. *Id.* at 628-29, 732 A.2d at 872.

178. *See id.* 629-32, 732 A.2d at 872-74 (finding that Wallace could not assert an artisan's lien on the sale price because he had surrendered possession and that any lien he could claim for repair of the modem was lost because he waived tender of the amount due under such lien).

these precedents back to the statute.[179] For example, in its discussion of the possessory nature of artisan's liens, the court, without mentioning the statute, cited *Patapsco Trailer Service & Sales, Inc. v. Eastern Freightways*[180] for the proposition that artisan's liens are lost when the artisan releases possession of the subject of the lien.[181] While the court correctly cited the holding in *Patapsco*, it failed to deal with the fact that the lien at issue in *Patapsco* was analyzed as a common-law artisan's lien, because it did not fall under the relevant lien statute.[182] Furthermore, the court cites only the *Restatement of the Law of Security* in its tender and waiver analysis.[183] To avoid confusion, the court should have related this authority back to the statute. Because the court acknowledged that Wallace was claiming a lien under the statute, and because the opinion seems to indicate that the court saw little difference between common-law and statutory liens, its opinion logically can be read as holding that statutory artisan's liens will be interpreted according to common-law principles. However, the opinion also could be read as holding that, while Wallace's claim did not fall within the lien statute, it could be recognized under common-law principles. In failing to expressly equate common-law and statutory artisan's liens, the court weakened this opinion as an interpretation of Maryland's artisan's lien statute.

b. The Court's Analysis of Possession, Intent, and Waiver Clarified the Law of Artisan's Liens.—In spite of the confusion with respect to the basis of the holding, the court's discussion of possession, intent, and waiver provides a useful explanation of three aspects of artisan's liens, which, in many jurisdictions, are pertinent to the assertion of both statutory and common-law artisan's liens.[184] Overall, the court's analysis clearly spelled out the details of each of these principles.[185] However, certain aspects of the possession and waiver discussions were strained. It is possible that this strain is a result of the court's determination to fully discuss each of these principles, even when faced with the absurdity of Wallace's claims.

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179. *See id.* at 629-30, 732 A.2d at 872 (citing *Winton Co. v. Meister*, 133 Md. 318, 105 A. 301 (1918), and *Patapsco Trailer Service & Sales, Inc.*, 271 Md. 558, 378 A.2d 817 (1974), for the respective common-law rules that an artisan may only assert a lien in the amount of the cost of the work done and that such a lien is dependent on possession).

180. 271 Md. 558, 565, 318 A.2d 817, 821 (1974).

181. *Wallace*, 354 Md. at 629-30, 732 A.2d at 872.

182. *See Patapsco*, 271 Md. at 564, 318 A.2d at 820.

183. *See Wallace*, 354 Md. at 632, 732 A.2d at 873-74.

184. *See supra* note 34 (illustrating that, in many jurisdictions, statutory artisan's liens are a contradiction of common-law artisan's liens).

185. *See Wallace*, 354 Md. at 629-33, 732 A.2d at 872-75.

(1) Possession.—The *Wallace* court recognized two situations where Wallace's possession of the server might have given rise to an artisan's lien.[186] The first occurred after the sale of the server, but prior to its installation.[187] The second situation occurred when Wallace removed the server from the Firm for repair of the modem.[188] However, only the second situation can plausibly give rise to an artisan's lien. In contrast, the first situation does not even resemble a typical artisan's lien situation.

In the first situation, the court concluded that no lien could have arisen in favor of Wallace after the initial sale and installation of the network because an artisan's lien is lost when the goods that are the subject are surrendered.[189] While the court is correct in this conclusion, the failure of a lien to arise in this situation has little to do with Wallace's loss of possession of the server. Wallace's delivery and installation of the server and the rest of the network to the Firm does not even resemble a typical artisan's lien situation. Artisan's liens arise when the *owner* of some object puts an *artisan* in possession of it for the purpose of doing some work on that item.[190] In the instant case, however, Wallace (the artisan) put the Firm (the owner) in possession of the server and other network components as a result of the sale of these items to the Firm.[191] Thus, the roles of the artisan and owner were reversed in terms of the possession requirement. The court was so focused on examining the possession requirement of artisan's liens that it failed to acknowledge the larger picture. Sale and installation of the server by Wallace is simply not a transaction that can give rise to an artisan's lien.

In contrast, Wallace's possession of the server for the purpose of repairing the modem does resemble a typical artisan's lien situation. Here, the Firm put Wallace in possession of the server for the purpose of repairing the modem.[192] In this situation, the *Wallace* court correctly concluded that an artisan may assert a lien on an item "only to the extent of the costs of repairing that particular item."[193] Thus,

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186. *See id.*

187. *See id.* at 629, 732 A.2d at 872.

188. *See id.* at 630-31, 732 A.2d at 872-73.

189. *Id.* at 629, 732 A.2d at 872.

190. *See supra* note 29 and accompanying text (indicating that the Maryland's artisan's lien statute and the common law require that an artisan must have possession of the item in question with the consent of its owner).

191. *See Wallace*, 354 Md. at 624-25, 732 A.2d at 869-70.

192. *Id.* at 625, 732 A.2d at 870.

193. *See id.* at 628-29, 732 A.2d at 871-72.

based on the possession requirement alone, the court was correct that repair of the modem may have given rise to a lien in favor of Wallace.

(2) Intent.—The *Wallace* court stated that, despite the plausibility of a lien in favor of Wallace for the reinstallation charges, such a lien did not arise, because the parties did not contemplate that there would be a charge for the work on the modem.[194] Instead, the court viewed the repair work as part of Wallace's attempt "to make the goods conform with the contract."[195] In reaching this conclusion, the court provided a clear example of the requisite intent that is necessary to give rise to an implied artisan's lien.

An artisan may assert a lien for work done on an item only when that item was given to him for that particular purpose.[196] In *Wallace*, there is no dispute that Lechman gave Wallace possession of the server in order to repair the modem.[197] Thus, the parties expressly intended Wallace to perform the work. However, as the court correctly pointed out, the question here was whether they intended to create a situation that could give rise to an artisan's lien.[198] As the Maryland decision of *Wilson v. Guyton* demonstrates, artisan's liens can arise by implication when the circumstances of the transaction indicate that the parties reasonably believe that a lien exists.[199] Thus, the court properly concluded that intent is not simply a question of whether the parties agreed that the artisan should perform some work, but also whether the parties either expressly agreed that a lien for the work would attach or such agreement can be inferred from the circumstances.[200] Wallace seemed to view the modem repair as a discrete transaction, separate from the sale and installation of the Network.[201] Lechman, on the other hand, seemed to view this work as simply one of many repairs made so that the network would perform as promised.[202] Thus, the question of intent turned on whose frame of reference the court adopted. The *Wallace* court indicated that establishment of intent to create an artisan's lien by implication requires more than a mere showing that the item was given to the

194. *Id.* at 631, 732 A.2d at 873.

195. *Id.*

196. *See, e.g.*, Assocs. Fin. Servs. Co., Inc. v. O'Dell, 417 A.2d 604, 606 (Pa. 1980) (holding that a towing company could not assert a lien against a tractor for the cost of towing because the owner never consented to the services provided).

197. *See Wallace*, 354 Md. at 625, 732 A.2d at 870.

198. *See id.* at 631, 732 A.2d at 873.

199. Wilson v. Guyton, 8 Gill 167, 168 (1849).

200. *See Wallace*, 354 Md. at 631, 732 A.2d at 873.

201. *See id.*

202. *See id.*

artisan for the purpose of doing some work on it.[203] Rather, determination of intent is a fact-intensive investigation into each party's view of the circumstances surrounding the transaction.[204]

(3) Waiver.—The court determined that, even if Wallace could claim a lien for repair of the modem, he waived this lien by claiming an excessive amount due and by unconditionally refusing to release the server until the Firm paid this amount.[205] However, apart from quoting the *Restatement of the Law of Security* and its illustrations, the court provided very little insight into what constitutes an unconditional demand.[206] This sparse analysis provides little guidance to artisans, who may be obliged to unequivocally demand payment from customers.

In a letter dated August 10, 1993, Wallace followed up his demand for payment by stating that "[i]f you fail to make . . . the payment on or before the final due date, then the system will be sold on September 1, 1993 for the highest offer."[207] The court was certainly justified in reading this statement as an unconditional demand for payment. But rather than merely pointing to the *Restatement* illustrations, the court should have given some guidance as to why it construed the letter as an unconditional demand. While this letter is strongly worded, the language is merely a statement of any artisan's rights under the artisan's lien statute.[208] Does every letter that demands payment from a delinquent customer, but erroneously states an excessive amount due, constitute an unconditional demand under the court's waiver analysis? Unfortunately, the court chose not to explicitly engage in such a discussion.

The court did state, however, that Wallace's refusal to release the server even after Lechman's reply—a letter dated August 27, 1993, disputing the amount due and demanding the return of the server—reinforced the conclusion that Wallace waived tender.[209] Thus, the

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203. *See id.* (concluding that, even though the parties agreed to have Wallace repair the modem, the circumstances surrounding this agreement indicated that there would be no charge for the repair and, thus, no lien could arise).

204. *See id.* (examining the facts found by the trial court and concluding that "Wallace's work on the modem continued his attempt to make the goods conform to the contract").

205. *See id.* at 631-32, 732 A.2d at 873-74.

206. *See id.* at 632, 732 A.2d at 874 (quoting the *Restatement (Second) of the Law of Security* and its illustrations and generally stating that "Wallace stands in the position of the bailor in Illustration 3 of the *Restatement*").

207. *Id.* at 625-26, 732 A.2d at 870.

208. *See* MD. CODE ANN., COM. LAW II § 16-302(b) (2000) (allowing an artisan to sell the item subject to the lien if the cost of the work is unpaid after 90 days and appropriate notice of the sale has been given to the owner of the item).

209. *Wallace*, 354 Md. at 632, 732 A.2d at 874.

court indicated that something beyond a mere demand for an excessive amount is required for an artisan to waive tender. Tender of payment can be waived when a bailor of some item reasonably believes the tender of the proper amount due will be refused.[210] The *Wallace* court's emphasis of the Lechman response letter may indicate that a bailor cannot reasonably assume that tender will be refused unless the artisan has some notice that his demand is excessive.

Unfortunately, the court's waiver analysis does not provide much guidance to artisans who may need to prod their customers into paying. However, Wallace's assertion of an artisan's lien on the balance due for the sale of the network was so outrageous that it is difficult to predict how the court would respond to a more reasonable demand. Perhaps any attempt at waiver analysis here is simply a stretch, given Wallace's highly implausible claims.

5. Conclusion.—*Wallace* represents an effort by the Court of Appeals to clarify the Maryland artisan's lien statute. It is readily apparent from a review of the facts in *Wallace* and the law of artisan's liens presented here that Wallace's claim for an artisan's lien was a weak one at best. Thus, the court's holding that Wallace could not claim an artisan's lien on the server for the balance due on the sale of the computer network is of secondary importance to its discussion of the principles of artisan's liens. The court seemed to treat Maryland's artisan's lien statute as a codification of common-law artisan's liens. Thus, Wallace's claimed lien was interpreted in light of the common-law requirements of possession, tender, and waiver. However, given that this opinion was intended to explain the law of artisan's liens, the court should have expressly related the common-law precedents cited in *Wallace* to the artisan's lien statute. Failing to engage in this statutory interpretation confuses the basis for the holding in this case. Adding to this confusion is the court's sparse analysis of waiver, which provides little guidance to other artisans in terms of how to demand payment without waiving their lien rights. However, perhaps a detailed discussion of waiver should await a more plausible claim for an artisan's lien. Despite this confusion, the Court of Appeals seems to have followed the trend of Maryland's sister jurisdictions and interpreted Maryland's artisan's lien statute as a codification of common-law artisan's liens.

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210. *See, e.g.*, Int'l Harvester Co. v. Mahacek, 705 S.W.2d 603, 604 (Mo. Ct. App. 1986); RESTATEMENT (SECOND) OF THE LAW OF SECURITY § 78 (1941).

B. The Derailing of Maryland Property Law

In *Chevy Chase Land Co. v. United States*,[1] the Court of Appeals of Maryland addressed three questions certified to it by the United States Court of Appeals for the Federal Circuit:[2] (1) whether, under Maryland law, a 1911 deed executed by Chevy Chase Land Company to provide a railroad a right-of-way in land upon which a railroad line had been built and operated since 1892 conveyed an interest in fee simple absolute or an easement; (2) if the deed conveyed an easement, whether the easement was limited as a matter of law; and (3) whether the easement had been abandoned as a matter of law, and if so, when.[3]

The Court of Appeals found that the deed conveyed an easement rather than an estate in fee simple absolute primarily because the deed's reference to a "right-of-way" carried a strong presumption that only an easement was intended.[4] Secondly, the court found that there were no express limitations on the use of the easement, because the language of the deed indicated general use of the land.[5] The court's characterization of the easement as a public highway embraced use of the easement for any and all public transportation purposes.[6] Because the court held that the free and perpetual scope of the easement was broad enough to allow use of the right-of-way as a hiker/biker trail, the appellants' contention that the easement's scope was limited by the deed to railroad purposes was inaccurate, and the appellants, therefore, failed to prove abandonment.[7] In an alternative discussion, the court assumed the validity of the appellants' contention and reasoned that even if the easement had been expressly limited to railroad purposes, the steps taken by the railroad in compliance with the federal regulatory scheme could not supply the necessary evidence of intent to abandon an easement as required by state law.[8]

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1. 355 Md. 110, 733 A.2d 1055 (1999).
2. Chevy Chase Land Co. v. United States, 158 F.3d 574, 575-76 (Fed. Cir. 1998).
3. *Chevy Chase*, 355 Md. at 117-18, 733 A.2d at 1059.
4. *Id.* at 118, 141, 733 A.2d at 1059, 1071-72.
5. *Id.* at 118, 156, 733 A.2d at 1059, 1080.
6. *Id.*
7. *Id.* at 119, 158, 733 A.2d at 1059, 1081.
8. *Id.* at 119, 175-76, 733 A.2d at 1059, 1090-91. The court noted that allowing such acts to constitute evidence of abandonment under state law would create a "Hobson's choice" for the railroad. *Id.* at 176, 733 A.2d at 1090. A "Hobson's choice" is "an apparently free choice when there is no real alternative." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 551 (10th ed. 1996).

The court's decision in *Chevy Chase* is troublesome because, in finding that the hiker/biker trail was within the easement's scope, the court failed to consider the rationale behind public highway cases. Furthermore, the court relied on a weak proposition in determining that an intent to abandon an easement was lacking. Its holding illustrates an inherent tension between federal regulations of railroads and state property law.

1. The Case.—Chevy Chase Land Co. v. United States initially arose from an action in the United States Court of Federal Claims where the Chevy Chase Land Company (the land company) and the Columbia Country Club (the country club) sought compensation for an alleged taking after a railroad corridor easement was conveyed by the Metropolitan Southern Railroad (the railroad) to Montgomery County, Maryland (the County).[9]

The parcel of land in dispute is situated in Montgomery County and measures approximately one mile long and 100-feet wide, covering about twelve acres.[10] The corridor constitutes a portion of a 6.4 mile railroad line designated as the "Georgetown Branch," running between Silver Spring, Maryland and the District of Columbia.[11] The use of this land as an easement initially arose under an 1891 agreement and was later incorporated into a deed executed by the land company to the railroad in 1911.[12]

The railroad line was constructed between 1892 and 1910 pursuant to the 1891 agreement between the land company and the railroad.[13] Under this agreement, the land company provided the railroad with a "right-of-way" over the strip of land, and a second parcel to be used "'for the purposes of a passenger and freight depot.'"[14]

In the 1911 deed, the land company conveyed "to the railroad, 'its successors and assigns, a free and perpetual right of way' over the land referred to in the 1891 agreement."[15] The 1911 deed also con-

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9. Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 552 (1997), *certifying questions to* 158 F.3d 574 (Fed. Cir. 1998), *certifying questions to* 355 Md. 110, 733 A.2d 1055 (1999).

10. *Chevy Chase*, 355 Md. at 119, 733 A.2d at 1059-60.

11. *Id.* at 119, 733 A.2d at 1060.

12. *Id.* at 120, 733 A.2d at 1060.

13. *Id.*

14. *Id.*

15. *Id.* The granting clause of the deed stated:

"[T]he said party of the first part [the land company] for and in consideration of the sum of FOUR THOUSAND (4,000) DOLLARS, to it paid by the said party of the second part, *does hereby grant and convey* unto the said party of the second part [the railroad], its successors and assigns, *a free and perpetual right of way*, one hun-

veyed the passenger and freight station parcel in fee simple in consideration of a $4000 payment by the railroad.[16] The deed "'mutually abrogated, canceled and set aside'" the 1891 agreement and "'released and discharged [the railroad] from the obligation . . . of erecting a passenger station to cost not less than Four Thousand (4,000) Dollars.'"[17]

In the mid-1980s, the railroad faced a decline in business and required significant repairs for the railroad corridor.[18] In response, the railroad sought and received federal regulatory approval to discontinue railroad service.[19] In the interim, the railroad agreed to transfer the right-of-way to the County for use as a hiker/biker trail under the federal Rails-to-Trails Act.[20]

The United States Court of Federal Claims granted summary judgment in favor of the appellees, Montgomery County and the United States, finding that the 1911 deed conveyed an estate in fee simple absolute, thus disposing of the takings claim.[21] The land company and country club appealed the decision to the Court of Appeals for the Federal Circuit, which certified the state law property questions to the Court of Appeals of Maryland.[22]

By way of dicta, however, the Court of Federal Claims stated that if the deed had conveyed only an easement limited to railroad purposes, then the railroad's subsequent acts constituted abandonment of the easement before the railroad conveyed the easement to Mont-

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dred (100) feet wide, *over the land and premises hereinafter designated as 'Parcel A'* and does hereby *grant and convey* unto the said party of the second part [the railroad], its successors and assigns, *in fee simple, the land and premises, hereinafter designated as 'Parcel B'*. . . ."

Id. at 128-29, 733 A.2d at 1065.

16. *Id.* at 120, 733 A.2d at 1060.

17. *Id.*

18. *See id.* at 120-21, 733 A.2d at 1060.

19. *Id.* at 121, 733 A.2d at 1060.

20. *Id.*, 733 A.2d at 1060-61. In 1983, Congress enacted the Rails-to-Trails Act, 16 U.S.C. § 1247(d) (1994), in an effort to preserve rapidly abandoned railroad corridors for future rail use and to encourage an interim use as recreational nature trails. *See* Preseault v. United States, 494 U.S. 1, 5 (1990). According to statistics often quoted on this topic, 272,000 miles of railroad trackage existed in the 1920s at the height of the railroading industry. *See id.* The advent of highway and air transportation has made shipping by rail less profitable. Birt v. Surface Transp. Bd., 90 F.3d 582, 582 (D.C. Cir. 1996). As a result, in 1996 there were only 141,000 miles of track remaining, with another 3000 miles per year expected to be lost until the end of the twentieth century. *Preseault*, 494 U.S. at 5.

21. Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545, 575 (1997).

22. Chevy Chase Land Co. v. United States, 158 F.3d 574, 575-76 (Fed. Cir. 1998); *see supra* text accompanying note 3 (providing the three questions certified to the Court of Appeals).

gomery County.[23] The Court of Federal Claims also stated that the construction of the 1911 deed, considering its language and the statutory scheme at the time, did not necessarily limit the easement to railroad or transportation purposes.[24] If the deed had limited the easement to railroad purposes, then the current use was outside of the easement's scope and a valid takings claim existed.[25]

2. Legal Background.—When interpreting the conveyance of a railroad right-of-way, courts typically address three questions: (1) Does the conveyance intend a fee simple interest or merely an easement? (2) If an easement was conveyed, what is the scope of that easement? and (3) Has the easement been abandoned?[26]

a. Determining Whether a "Right-of-Way" Conveys an Easement or an Interest in Fee Simple.— In Maryland, a deed that refers to a railroad "right-of-way" without expressing any other intent to convey a fee simple estate creates a strong presumption that the deed conveys an easement.[27] In *Richfield Oil Corp. v. Chesapeake & Curtis Bay Railroad Co.*,[28] the Court of Appeals clarified that an exchange deed conveying a right-of-way for railroad purposes,[29] but lacking express language necessary to evidence an intention to convey a fee simple estate,[30] grants only an easement.[31] A deed containing the words "grant" or "bargain and sell" is likely to pass a fee simple estate unless a contrary intent is shown by including limiting language that reserves a portion of the

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23. *Chevy Chase*, 37 Fed. Cl. at 581-82.

24. *Id.* at 586.

25. *Id.* at 587.

26. *See* Robin W. Foster, Note, RLTD Railway Corporation v. Surface Transportation Board*: A Jurisdictional Derailment—Has the Sixth Circuit Thrown the Switch on the Congressional Policy of Promoting "Railbanking," the Conversion of Abandoned Railroad Tracks into Recreational Hiking and Biking Trails?*, 27 N. KY. L. REV. 601, 607-08 n.40 (2000) (explaining the considerations courts must make in determining the type of property interest conveyed to railroads).

27. *See* Richfield Oil Corp. v. Chesapeake & Curtis Bay R.R. Co., 179 Md. 560, 572-73, 20 A.2d 581, 587-88 (1941) (holding that use of the phrase "right-of-way" granted an easement and not fee simple); *see also* United States v. 1.44 Acres of Land, 304 F. Supp. 1063, 1071 (D. Md. 1969) (citing *Richfield*, 179 Md. at 572-73, 20 A.2d at 587-88, for the proposition that, absent a clear manifestation of intent to convey as fee simple, a deed granting a "right-of-way" conveys only an easement); D.C. Transit Sys., Inc. v. State Rds. Comm'n of Md., 259 Md. 675, 687-89, 270 A.2d 793, 799 (1970) (same); Green v. Eldridge, 230 Md. 441, 448-49, 187 A.2d 674, 678 (1962) (same); Miceli v. Foley, 83 Md. App. 541, 570-71, 575 A.2d 1249, 1264 (1990) (same).

28. 179 Md. 560, 20 A.2d 581 (1941).

29. *Id.* at 564-65, 20 A.2d at 584.

30. *Id.* at 572-73, 20 A.2d at 587-88.

31. *Id.*

estate to the grantor.[32] Courts do not often construe railroad rights-of-way in fee simple, because to do so would sever narrow strips of land from the neighboring estates, limiting the land's utility.[33] When an isolated strip of land is no longer useful as a railroad corridor, it is often difficult to find another productive use.[34]

In *Richfield*, Chesapeake and Curtis Bay Railroad Company's (C&CBRR) successor in interest, the Western Maryland Railway Company (the railway company), sought to prevent the Richfield Oil Company (Richfield) from laying pipeline across and beneath a railroad corridor.[35] Richfield claimed that it owned the land beneath the railroad tracks in fee simple and were authorized to cross the tracks and to make improvements beneath them as long as there was no interference with the railway company's operation and use of the right-of-way.[36] The controversy centered around a 1925 exchange deed between C&CBRR and the United States Asphalt Refining company (the refining company), Richfield's predecessor, in which C&CBRR reconveyed certain properties to the refining company.[37] The refining company, in turn, granted C&CBRR "the rights of way for railroad purposes."[38] The Court of Appeals determined that the interest held by the railway company was an easement for railroad purposes only.[39] The court reasoned that to find that Richfield had granted a fee simple interest in the railroad corridor would frustrate the oil company's business efforts by dividing its property and making it impossible to cross from one part of its property to another.[40]

b. Construing the Scope of a Railroad Easement.—The scope of an easement is determined from the granting language in the deed in an attempt to give effect to the original parties' intentions.[41] First, the court will attempt to ascertain the parties' intentions from the plain and ordinary meaning of the language contained in the deed.[42]

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32. *Id.* at 572, 20 A.2d at 587.

33. *See id.* (describing the difficulty the grantor company would encounter in maintaining its property on either side of the railroad strip if it had been conveyed in fee simple).

34. *See* D.C. Transit Sys., Inc. v. State Rds. Comm'n of Md., 259 Md. 675, 688-89, 270 A.2d 793, 800 (1970) (recognizing the limited uses for an easement only eighty feet wide).

35. *See Richfield*, 179 Md. at 562-63, 20 A.2d at 583.

36. *See id.*

37. *Id.* at 566, 20 A.2d at 585.

38. *Id.*

39. *Id.* at 573, 20 A.2d at 588.

40. *Id.* at 572, 20 A.2d at 587.

41. *See* Buckler v. Davis Sand & Gravel Corp., 221 Md. 532, 537, 158 A.2d 319, 322 (1960) (identifying an assessment of the parties' intent as a primary step in construing a grant of an interest in land).

42. *See id.*, 158 A.2d at 322-23.

Should the deed's language, on its face, contain ambiguities, then the court may consider extrinsic evidence of the parties' intentions.[43]

In *Calomiris v. Woods*,[44] the Court of Appeals summarized the guidelines for resolving ambiguities that appear on the face of a contract.[45] To determine whether ambiguities exist, the court makes a comprehensive assessment of the contract, including the circumstances surrounding its creation.[46] Evidence introduced to resolve an ambiguity in another clause of the contract may not be used to raise the possibility of an ambiguity in otherwise unambiguous language.[47] The court may consider the understandings of the parties to the contract in order to discern the contract's terms and resolve a particular ambiguity.[48] If the ambiguity is resolved based on parol evidence, then the deed's meaning remains a question of law, leaving nothing for the jury.[49] In addressing a conflict between a deed's granting clause and habendum clause,[50] the court should prefer the granting clause.[51] The ambiguous language is to be most strongly construed against the grantor. This principle of interpretation should be a last resort, and courts will rely upon it "only where all other rules of expo-

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43. Calomiris v. Woods, 353 Md. 425, 447, 727 A.2d 358, 368-69 (1999) (discussing the legal principles to be applied when interpreting ambiguous terms of a contract).

44. 353 Md. 425, 727 A.2d 358 (1999).

45. *See id.* at 436, 727 A.2d at 363. Contract interpretation is a question of law; if conflicting extrinsic evidence exists to support varying resolutions of contractual ambiguities, then it is for the fact-finder to weigh and give meaning to the uncertain clauses. Pac. Indem. Co. v. Interstate Fire & Cas. Co., 302 Md. 383, 389, 488 A.2d 486, 489 (1985).

46. *See Calomiris*, 353 Md. at 436, 727 A.2d at 363 (explaining that "[t]he determination of whether language is susceptible of more than one meaning included a consideration of 'the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution'" (quoting *Pac. Indem. Co.*, 302 Md. at 388, 488 A.2d at 488)).

47. *See id.* at 441, 727 A.2d at 366 ("The extrinsic evidence admitted must help interpret the ambiguous language and not be used to contradict other, unambiguous language in the contract.").

48. *See id.* at 447, 727 A.2d at 369 (finding that a party can introduce relevant extrinsic evidence to demonstrate a plausible interpretation of an opponent's intent); *see also* Buckler v. Davis Sand & Gravel Corp., 221 Md. 532, 537, 158 A.2d 319, 322 (1960) (stating that a court, when construing a grant of an easement, should try to uncover and respect the intention of the parties at the time of a contract's creation).

49. *Pac. Indem. Co.*, 302 Md. at 389, 488 A.2d at 489.

50. A granting clause is "[t]hat portion of a deed or instrument of conveyance which contains the words of transfer of a present interest." BLACK'S LAW DICTIONARY 700 (6th ed. 1990). A habendum clause "usually follow[s] the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee." *Id.* at 710.

51. D.C. Transit Sys., Inc. v. State Rds. Comm'n of Md., 259 Md. 675, 686, 270 A.2d 793, 798-800 (1970).

sition fail to reach, with reasonable certainty, the intention of the parties."[52]

As a general rule, any changes in an easement's use must not be so substantial as to create a new and different servitude.[53] If the new use continues to promote the purpose for which the easement was first obtained, then this new use is within the scope of the easement.[54] Where a broad easement has been granted, any doubts concerning the language of the grant are resolved in favor of the grantee.[55]

Maryland recognizes that railroad companies are organized, in part, to provide a public transportation service.[56] While a railroad company exists to generate a profit for private individuals, it does so through a dedication to serving the public.[57] When a railroad company uses a parcel of land for public benefit, courts have characterized the railroad as a quasi-public corporation.[58] When an easement is granted to a quasi-public corporation, any altered use of the easement must continue serving the public purpose for which the easement was first granted.[59]

Courts have generally found that railroad easements are limited to railroad purposes, particularly where language within the deed indicates such a restriction.[60] When deeds contain phrases like "for railroad purposes" or "for chartered purposes" within the granting or habendum clause, Maryland courts have interpreted such language as

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52. Richfield Oil Corp. v. Chesapeake & Curtis Bay R.R. Co., 179 Md. 560, 569, 20 A.2d 581, 586 (1941) (internal quotation marks omitted) (quoting Hodges v. Owings, 178 Md. 300, 304, 13 A.2d 338, 340 (1940), quoting in turn Zittle v. Weller, 63 Md. 190, 196 (1885)).

53. *See* Reid v. Wash. Gas Light Co., 232 Md. 545, 549, 194 A.2d 636, 638 (1963) (noting that, in the absence of mutual consent of both parties, the owner of the dominant estate may not alter the use of an easement in a way that further restricts the rights of the servient property owner).

54. Poole v. Falls Rd. Elec. Ry. Co., 88 Md. 533, 537, 41 A. 1069, 1071 (1898). Where the change in the use is "merely one of quality and not substance there will be no resulting surcharge to the servient estate." *Reid*, 232 Md. at 549, 194 A.2d at 638.

55. *Reid*, 232 Md. at 549, 194 A.2d at 638.

56. *See* Whalen v. Balt. & Ohio R.R. Co., 108 Md. 11, 21, 69 A. 390, 393 (1908) (commenting that "'a railroad company is a public service corporation, and is obliged to use its powers and privileges for the benefit of the public, and in aid of the public good'" (quoting Brief of Appellees)).

57. Hessey v. Capital Transit Co., 193 Md. 265, 272, 66 A.2d 787, 790 (1949).

58. *See* Read v. Montgomery County, 101 Md. App. 62, 68, 643 A.2d 476, 478-79 (1994).

59. Md. & Pa. R.R. Co. v. Mercantile-Safe Deposit & Trust Co., 224 Md. 34, 39, 166 A.2d 247, 250 (1960).

60. *See* D.C. Transit Sys., Inc. v. State Rds. Comm'n of Md., 259 Md. 675, 686-87, 270 A.2d 793, 798-99 (1970).

limiting the easement holder's use of the land.[61] Courts have emphasized that in such cases, the railroad is obligated to stay true to the nature of the easement as conveyed.[62]

For example, in *AT&T v. Pearce*, the court held that the use of a railroad easement for the installation and use of telephone and telegraph lines imposed a new burden on the easement.[63] Even though AT&T could have operated the lines for the benefit of the railroad at no charge, the court found that AT&T had exceeded the scope of the easement because the lines would benefit the business of AT&T and its communication objectives.[64] It was of little consequence to the court that the lines would not inhibit the railroad's operation but instead would present a more efficient means of railroading.[65]

In *East Washington Railway Co. v. Brooke*,[66] the Court of Appeals found that a deed containing language creating an easement to be "used for railroad purposes" was limited to railway purposes only.[67] In that case, Mary G. Brooke brought an action to quiet title over a strip of land in Prince George's County through which the East Washington Railway Company had operated.[68] Brooke claimed to have occupied the land for over twenty years and thus claimed the land by adverse possession.[69] The railway company, however, claimed to possess an easement over the strip of land.[70] The Court of Appeals found that the railway company had abandoned the easement by removing the rails and ties and by stating that it never intended to operate a railroad through it again.[71] Since the conveyancing language of the

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61. E. Wash. Ry. Co. v. Brooke, 244 Md. 287, 294, 223 A.2d 599, 603 (1966) (holding that an easement that had been granted "for railroad purposes" reverted to the original owners when "the railroad intentionally abandoned the present and future use of the contested strip for railroad purposes"); *see, e.g.*, Richfield Oil Corp. v. Chesapeake & Curtis Bay R.R. Co., 179 Md. 560, 572-73, 20 A.2d 581, 587-88 (1941) (holding that the phrase "right of way for railroad purposes" created an easement dedicated to railroad purposes only).

62. *See, e.g.*, Am. Tel. & Tel. Co. v. Pearce, 71 Md. 535, 549-52, 18 A. 910, 914-16 (1889) (holding that the installation of a telephone line along a railroad right-of-way to serve telephone and telegraph communication purposes beyond those associated with the railroad business constituted a new servitude on the land supporting a business purpose outside of the railroad easement's scope).

63. *Id.* at 552, 18 A. at 916.

64. *Id.* at 551, 18 A. at 915.

65. *Id.* at 552, 18 A. at 915-16.

66. 244 Md. 287, 223 A.2d 599 (1965).

67. *Id.* at 294, 223 A.2d at 603.

68. *Id.* at 289, 223 A.2d at 600.

69. *Id.*

70. *Id.*

71. *Id.* at 293, 223 A.2d at 603.

easement stated that it was to be "used for railroad purposes," the strip was returned unburdened to the original owners.[72]

In *Peddicord v. Baltimore, Catonsville & Ellicott's Mills Passenger Railway Co.*,[73] the Court of Appeals discussed the circumstances under which a modified use conforms with a pre-established public highway easement.[74] *Peddicord* involved changes to the grade of a public road to accommodate a horse passenger railway involving a team of horses pulling cars along railroad tracks.[75] Since the easement was originally granted for public transportation and convenience, the court determined that the use of the easement for a passenger railway was within the legal contemplation of the parties at the time of the easement's creation and therefore was allowed.[76]

Courts generally do not limit the use of a public highway easement, because they want to encourage implementation of improvements made available through technological advances.[77] Where an original easement is created as a public highway, the scope of the easement embraces all existing modes of transportation and "all such as might arise in the ordinary course of improvement."[78] As long as the new means do not exact any additional burdens upon the estate, but instead provide an "advancement of public convenience . . . to a more comfortable and more economical enjoyment of it by the public as a

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72. *Id.* at 294, 223 A.2d at 603.

73. 34 Md. 463 (1871).

74. *Id.* at 480-81 (recognizing that an easement granted to a turnpike company for use as a public highway could be adapted for use as a passenger railway).

75. *Id.* at 470. The court queried whether the laying of the railway track constituted "such a diversion or enlargement of the easement as operated to impose additional burdens on the land, or to destroy or impair the incidental rights of the owner." *Id.* at 480.

76. *Id.* at 480-81; *see also* Green v. City & Suburban Ry. Co., 78 Md. 294, 306-07, 28 A. 626, 629-30 (1894) (recognizing the notion of legal contemplation discussed in *Peddicord* and relying on it to allow the installation of an electric railway in a turnpike road).

77. *See Green*, 78 Md. at 306, 28 A. at 629. In *Green*, the Court of Appeals permitted the conversion of a dirt road to one with electric railway cars, even though it was unlikely that the original parties had anticipated the advancement. The court explained that, while it was true that the parties had not anticipated the construction of a railway,

> it [was] equally true that the law would not require this to be continued as 'a dirt road' simply because it was originally constructed in that way. This road well illustrates the progress that has been made within the past century. At first it was a poorly constructed dirt road, then it became a turnpike, then, . . . a horse car railway, which . . . must now give way to an improved method of travel.

Id.

78. Balt. County Water & Elec. Co. v. Dubreuil, 105 Md. 424, 431, 66 A. 439, 441 (1907); *see also Peddicord*, 34 Md. at 480-81.

highway," then the court will likely find that it is within the scope of the easement.[79]

c. Abandoning a Railroad Easement Under Common Law and Federal Regulation.—In order to find that an easement has been abandoned, both an intent to abandon along with an act clearly indicative of that intent must exist.[80] Mere nonuse of the easement alone is not enough to satisfy this standard; instead, the indicative act must be decisive in nature.[81] When a railroad stops using a rail corridor for a public purpose, the Court of Appeals has found that the public easement has been abandoned.[82] Often, the discontinuation of service and removal of the track alone is sufficient for a finding of abandonment.[83] However, where the railroad offers testimony disclaiming an intent and indicating plans to put an unused corridor to a later use, the Court of Appeals has found nonuse and removal of the tracks to be inadequate proof of abandonment.[84]

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79. *Peddicord*, 34 Md. at 481; *see id.* at 480-81 (finding the laying of a railroad track for a horse railway along a common highway to be within the easement's scope).

80. D.C. Transit Sys., Inc. v. State Rds. Comm'n of Md., 265 Md. 622, 625-27, 290 A.2d 807, 810-11 (1972); *see* Md. & Pa. R.R. v. Mercantile-Safe Deposit & Trust Co., 224 Md. 34, 39, 166 A.2d 247, 250 (1960) (finding that the cessation of rail service and removal of rails and ties from a right-of-way indicated an intention to abandon the easement); Hagerstown & Frederick R.R. Co. v. Grove, 141 Md. 143, 146, 118 A. 167, 168 (1922) (finding that the removal of rail ties and the repair of a street to its previous condition constituted an intent to abandon); Vogler v. Geiss, 51 Md. 407, 410 (1879). In *Vogler*, the Court of Appeals stated that

> whether the act of the party entitled to the easement amounts to an abandonment or not, depends upon the intention with which it was done . . . . A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time.

Id. But see Canton Co. of Balt. v. Balt. & Ohio R.R. Co., 99 Md. 202, 218, 57 A. 637, 639 (1904) (finding that the testimony of a railroad employee disclaiming an intent to abandon and evidence of future plans to use the easement were sufficient to prevent abandonment).

81. *Canton Co.*, 99 Md. at 219, 57 A. at 639 (citing *Vogler*, 51 Md. at 410).

82. *See, e.g.*, E. Wash. Ry. Co. v. Brooke, 244 Md. 287, 293, 223 A.2d 599, 603 (1965); *Md. & Pa. R.R. Co.*, 224 Md. at 39, 166 A.2d at 249.

83. *See Grove*, 141 Md. at 145-46, 118 A. at 167-68. In *Grove*, the Court of Appeals found sufficient abandonment where the railroad acted under a local ordinance that required cessation and termination of the right to operate the railway on a particular street. *Id.* The railroad removed the track and repaired the street to return it to its prior condition. *Id.* The railroad then constructed and operated the railway on another street. *Id.* at 146, 118 A. at 168; *see also* United States v. 1.44 Acres of Land, 304 F. Supp. 1063, 1069 (D. Md. 1969) (relying, in part, on *Grove* to arrive at the same conclusion that an easement is abandoned when a railroad removes its tracks from a road, repairs the road to the condition it was in before the rails were installed, and lays rails on an entirely different street).

84. *Canton Co.*, 99 Md. at 214-17, 57 A. at 637-38; *see also Md. & Pa. R.R. Co.*, 224 Md. at 40, 166 A.2d at 250 (citing *Canton Co.* and holding that it was appropriate to find an intent

The extensive federal regulations governing abandonment of railroad lines impacts the way state law applies to matters of easements and the disposition of underlying property interests.[85] Since the 1920s, the federal government has occupied the field of interstate rail carrier regulations.[86] A railroad may not abandon a railway line without prior approval of the Interstate Commerce Commission (the ICC).[87]

While Maryland property law poses the "intent and overt act" requirement to establish abandonment, the ICC institutes a per se ban on abandonment of railroad lines without prior ICC approval.[88] If the ICC finds that abandonment of a railway line serves "public convenience and necessity"[89] as determined through a balancing test, then it issues an order granting the railroad the option of abandoning.[90] The ICC may reconsider the order upon a finding of "material error, new evidence, or substantially changed circumstances."[91] ICC jurisdiction over the rail line ceases only after the railroad finalizes the abandonment process by acting on the ICC's permission.[92]

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to abandon where "there was no evidence disclaiming an intent to abandon the right of way").

85. *See* Marc A. Sennewald, Note, *The Nexus of Federal and State Law in Railroad Abandonments*, 51 VAND. L. REV. 1399, 1419-20 (1998) (discussing the impact of federal railroad regulations on state property law).

86. *See* Transportation Act of 1920, ch. 91, § 402(18), 41 Stat. 456, 477-78 (1920) (forbidding any railroad from abandoning a railroad line without prior federal approval); 49 U.S.C. § 10903(a) (1994) (same); Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 8 (1990) ("State law generally governs the disposition of reversionary interests, subject of course to the ICC's 'exclusive and plenary' jurisdiction to regulate abandonments . . . ." (quoting Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (1981)); Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 ECOLOGY L.Q. 351, 435 (2000) (explaining that since 1920, the Transportation Act effectively preempted state laws).

87. Transportation Act of 1920 § 402(18). In 1996, the regulatory responsibilities of the ICC were assumed by the Surface Transportation Board. *See* 49 U.S.C. § 701(b)(4) (transferring members of the ICC with unexpired terms to the Surface Transportation Board); *id.* § 702 (directing the Surface Transportation Board to perform the ICC's function). For the sake of consistency, this Note will follow the practice of the Court of Appeals and refer only to the ICC.

88. *See Chevy Chase*, 355 Md. at 172, 733 A.2d at 1088 (explaining the ICC's interest in regulating railroad abandonment).

89. 49 U.S.C. § 10903(a)(2).

90. *See id.* § 10903(b)(1); Colorado v. United States, 271 U.S. 153, 168-69 (1926) (articulating the ICC's considerations in determining whether abandonment is appropriate).

91. 49 U.S.C. § 10327(g)(1).

92. *See Chevy Chase*, 355 Md. at 163, 733 A.2d at 1083 (explaining that a "railroad may choose not to exercise its permission [from the ICC] to abandon").

In passing the Rails-to-Trails Act,[93] Congress provided the ICC with an additional option to the traditional abandonment order: a railroad company may begin abandonment proceedings and then enter into negotiations with a state or local government or private entity to transfer the use of the right-of-way.[94] Upon transfer, the third party would be financially and legally responsible for the trail's maintenance.[95] During the negotiation process, the ICC issues a Certificate of Interim Trail Use granting the railroad a delay of 180 days until the certificate of abandonment becomes effective, thus providing the parties with time to negotiate the interim trail use agreement without the threat of premature abandonment.[96] If an agreement is reached, then the ICC issues an order to discontinue service rather than authorize the abandonment of the rail line.[97] The Rails-to-Trails Act provides that "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."[98] Indeed, courts have considered a railroad's participation in a rails-to-trails program as evidence that the railroad did not intend to abandon its use of the easement.[99]

3. The Court's Reasoning.—In *Chevy Chase Land Co. v. United States*, the Court of Appeals addressed each of the three questions certified by the United States Court of Appeals for the Federal Circuit.[100] First, the court determined that the use of the term "right-of-way" intended to convey an easement only.[101] Second, the court explored whether that easement contained any express limitations, finding that the deed's use of words like "free" and "perpetual" provided support for finding a broad use of the easement.[102] Lastly, the court deter-

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93. 16 U.S.C. § 1247 (1994).

94. 49 C.F.R. § 1152.29 (2000).

95. 16 U.S.C. § 1247(d) (permitting an interim use of a railroad corridor where a "State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability").

96. 49 C.F.R. § 1152.29(c)(1) (permitting the railroad to discontinue service, cancel any tariffs, and remove track and other materials 30 days after the CITU is issued, but permitting full abandonment only if no interim use agreement is reached within 180 days).

97. *Id.*

98. 16 U.S.C. § 1247(d).

99. *See, e.g.*, Birt v. Surface Transp. Bd., 90 F.3d 580, 587 (D.C. Cir. 1996) (indicating that a railroad company's participation in negotiations for an interim trail use does not express a definite intent to abandon).

100. *Chevy Chase*, 355 Md. at 117-18, 733 A.2d at 1059; *see supra* text accompanying note 3 (listing the three questions certified to the Court of Appeals by the United States Court of Appeals for the Federal Circuit).

101. *Chevy Chase*, 355 Md. at 118, 733 A.2d at 1059.

102. *Id.*

mined in dicta that even if the easement had been limited to railroad purposes, ICC jurisdiction over the rail corridor and the railway's compliance with the Rails-to-Trails Act indefinitely delayed any intent to abandon the easement.[103]

a. The 1911 Deed Conveyed an Easement to the Railroad.—The court found that the 1911 deed had conveyed an easement rather than a fee simple estate, reasoning that the deed lacked express language that indicated that the right-of-way was a fee simple interest.[104] Moreover, the presumption that a right-of-way grants an easement only,[105] and the history of the rail corridor's use led the court to conclude that the 1911 deed was intended to convey an easement.[106] The court recognized that "easement" and "right-of-way" are used synonymously and that reference to a right-of-way in a deed generally conveys an easement only.[107] The court underscored this presumption with policy reasons, noting that a right-of-way conveyed in fee simple would be of limited use as a sliver of land severed from the adjoining estates upon the termination of railroad service.[108] Furthermore, the court reasoned, conveying an easement rather than a fee simple interest serves the purposes for which the land is originally used without limiting the land's future uses.[109] The court explained that a right-of-way nonetheless could be conveyed in fee simple, but that this type of conveyance must be stated clearly in the deed language.[110] For these reasons, an ambiguous deed simply using the term "right-of-way" conveys an easement only.[111]

In this case, the court explained, the deed referred to a "free and perpetual right of way, one hundred (100) feet wide, over the land and premises hereinafter designated as 'Parcel A.'"[112] A later portion of the deed conveyed Parcel B in fee simple.[113] The court found that if the parties had intended to convey Parcel A in fee simple they could have used the same language that they had used to convey Parcel B in

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103. *Id.* at 119, 733 A.2d at 1059.

104. *Id.* at 134, 733 A.2d at 1068.

105. *See id.* at 125-30, 733 A.2d at 1063-65 (detailing how the terms "right-of-way" and "easement" have become synonymous over time).

106. *Id.* at 135-36, 733 A.2d at 1068-69.

107. *Id.* at 125-26, 733 A.2d at 1063.

108. *Id.* at 127-28, 733 A.2d at 1064.

109. *Id.*

110. *Id.* at 128, 733 A.2d at 1064.

111. *Id.*

112. *Id.* at 129, 733 A.2d at 1065 (emphasis omitted) (internal quotation marks omitted) (quoting the granting clause of the 1911 deed from the land company to the railroad).

113. *Id.*

fee simple.[114] The fact that at the time of the 1911 conveyance, Parcel A was already being used for the operation of a railroad limited Parcel A to an easement.[115] Moreover, the $4000 consideration paid by the railroad was deemed by the court to be a nominal price, providing further support that only an easement had been created.[116]

b. The Scope of the 1911 Easement Is Broad Enough to Allow Use as a Hiker/Biker Trail.—In construing the scope of the easement, the court first looked to the language of the grant.[117] The 1911 deed did not contain any language limiting the use of the right-of-way to railroad purposes only.[118] Rather, the court found that the terms in the deed "free and perpetual" clearly indicated the granting of an easement of infinite duration and with an extensive and broad scope.[119] Furthermore, the deed contained no express limiting terms concerning the use of the right-of-way, and, thus, the cases in which the court had previously found more narrowly defined easements were inapposite.[120] The broad language of the document provided the court with additional support in construing the deed to allow for the grantee's "free and untrammeled use of the land."[121]

The court recognized that the adaptation of the easement to a hiker/biker trail was a change in the use of the land similar to changes made to public highway easements in that both maintained the essential transportation purpose of the original easement.[122] Accordingly, the court found that the new use was within the legal contemplation of the parties to the 1911 deed.[123] Since "the purpose for which the public easement was acquired is the overriding factor in the analysis rather than the mode or instrumentality of use,"[124] use of the

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114. *Id.* at 131, 733 A.2d at 1066. The court explained:

> To hold that both Parcel A and Parcel B conveyed estates in fee would be to ignore what we believe is self-evident from the deed: that the parties intended to convey different interests, one for the "right of way" designated as Parcel A and the other for "the land and premises" in "fee simple" and designated as Parcel B. If the intent was to convey Parcel A as an estate in fee, no drafting hurdles would have prevented making such intent explicit.

Id. at 131-32, 733 A.2d at 1066.

115. *Id.* at 141, 733 A.2d at 1071-72.

116. *Id.* at 138-40, 733 A.2d at 1070-71.

117. *Id.* at 143, 733 A.2d at 1073.

118. *Id.*

119. *Id.*

120. *Id.* at 144, 146 n.7, 733 A.2d at 1073, 1074 n.7.

121. *Id.* at 145, 733 A.2d at 1074 (internal quotation marks omitted) (quoting 7 THOMPSON ON REAL PROPERTY § 60.04(a), at 451 (David A. Thomas ed., 1994)).

122. *Id.* at 150-51, 733 A.2d at 1076-77.

123. *Id.*, 733 A.2d at 1077.

124. *Id.* at 148, 733 A.2d at 1075.

easement as a hiker/biker trail was within the scope of the original parties' intent.[125]

The court then examined whether or not the hiker/biker trail posed any additional burdens on the servient estate.[126] Had the court found that the trail imposed a burden greater than that associated with freight train use, the adapted use would constitute a new use beyond the easement's scope.[127] The court found, however, that the use of the right-of-way by hikers and bikers was actually less burdensome than use by freight trains.[128] Therefore, the court reasoned that no unreasonable burdens existed on the servient estate as a result of the use of the right-of-way as a recreational trail.[129]

c. Compliance with ICC Regulations Strongly Inhibits a Finding of Abandonment Under Maryland Property Law.—In addressing the final certified question—whether the railroad had abandoned its easement—the court found that the broad scope of the easement prevented a finding of abandonment.[130] Having determined that the scope of the easement was not limited to railroad purposes, the court disposed of the land company's and the country club's assertion that the railroad had abandoned its easement when it ceased railroad service along the corridor.[131]

In dicta, the court went on to consider the potential result if it assumed *arguendo* that the easement's scope was limited to use for railroad purposes only.[132] The court began this discussion by stressing that the determination of railroad abandonment, like all questions of abandonment, hinged on the consideration of a number of factors; mere non-use of the easement was insufficient to establish abandonment.[133] If, in addition to non-use, the railroad had acted in such a way that clearly indicated an intent to abandon the easement, then a finding of abandonment might have been possible.[134]

Having laid this groundwork, the court reviewed the federal regulatory scheme impacting railroads, acknowledging that even before

125. *Id.* at 150, 733 A.2d at 1076.
126. *Id.* at 151-54, 733 A.2d at 1077-79.
127. *Id.* at 152, 733 A.2d at 1077 (citing Reid v. Wash. Gas Light Co., 232 Md. 545, 549, 194 A.2d 636, 638 (1963) (holding that where a change in the use of an easement is one of quality and not substance, no additional servitude is created)).
128. *Id.* at 152-53, 733 A.2d at 1077-78.
129. *Id.* at 153, 733 A.2d at 1078.
130. *Id.* at 158, 733 A.2d at 1081.
131. *Id.* at 157, 733 A.2d at 1081.
132. *Id.* at 158, 733 A.2d at 1081.
133. *Id.* at 159, 733 A.2d at 1081.
134. *Id.*

the Rails-to-Trails Act, railroads were subject to extensive federal regulations governing when a railroad may abandon or discontinue service.[135] The court noted that the creation of the Rails-to-Trails Act provided railroads with an option in addition to abandonment or discontinuation of service when faced with the economic burden of maintaining an unprofitable railroad line.[136] The court also recognized that, in addition to the applicable federal laws and regulations, a railroad's disposition of its property is subject to Maryland law once the ICC has approved abandonment.[137] However, the court reasoned that the Maryland statute requiring notification of an intent to abandon[138] only becomes effective once federal oversight of the railroad has ceased.[139]

The court then analyzed the railroad's actions under this regulatory scheme.[140] Ultimately, the court found that the railroad did not abandon the easement, because it never intended to do so.[141] Instead, the railroad had acted with the intent of entering into an agreement with Montgomery County for an interim use of the trail.[142] The court explained that the strip of land could not have been "abandoned under federal law because the trail use is only interim, and federal regulators may require the restoration of rail service."[143] Rather, the court construed the railroad's actions as those conducted in accordance with federal law with the intention of obtaining regulatory approval of discontinuance of service.[144] As a result, the ICC continued its jurisdiction over the right-of-way, preserving the easement and preventing the land company from reclaiming its interest as the

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135. *Id.* at 162-63, 733 A.2d at 1083 (recounting the types of federal regulations with which railroad carriers must comply).

136. *Id.* at 163-64, 733 A.2d at 1084.

137. *Id.* at 166, 733 A.2d at 1085 (citing MD. CODE ANN., TRANSP. I § 7-901 (1993) (requiring notification by a railroad of an intent to dispose of a corridor in an effort to ensure that the state has an opportunity to acquire abandoned railroad property); MD. CODE ANN., NAT. RES. I § 5-1010 (2000) (expressing the state's interest in maintaining railroad corridors for trail use)).

138. MD. CODE ANN., TRANSP. I § 7-901.

139. *Chevy Chase*, 355 Md. at 166-67, 733 A.2d at 1085-86 (stating that this interpretation is compatible with the ICC's "exclusive plenary" jurisdiction over railroads until abandonment has been approved).

140. *Id.* at 167-71, 733 A.2d at 1086-88.

141. *Id.* at 170, 733 A.2d at 1087-88 (noting that while the railroad intended to sell its right-of-way under a rails-to-trails program, this intention was "inconsistent within an intent to abandon the property interest").

142. *Id.* at 170-71, 733 A.2d at 1087-88 (finding that acting in compliance with the Rails-to-Trails Act precluded the possibility that the railroad had acted to abandon the easement).

143. *Id.*, 733 A.2d at 1088 (citing 49 C.F.R. § 1152.29(c)(2)).

144. *Id.* at 175, 733 A.2d at 1090.

holder of the underlying fee simple estate.[145] The court explained that to find that the railroad had abandoned the easement would be to find that it had acted in violation of a federal statute and that it had taken such action without seeking ICC approval,[146] thus subjecting itself to criminal and civil penalties.[147] Moreover, the court emphasized that to find that ICC approval of regulatory abandonment also provided adequate evidence of an intent to abandon under state law would make rails-to-trails agreements virtually impossible[148]—to do so would transform the regulatory abandonment necessary to create an interim trail use under the Rails-to-Trails Act into evidence of abandonment and render useless federal and state attempts to preserve railroad corridors.[149]

In terms of decisive acts necessary to show an intent to abandon, the court found an even less compelling case for abandonment.[150] The railroad, rather than failing to ever use the corridor, actually used it for ninety years, and it only discontinued service after a storm had washed out a bridge.[151] The railroad did not remove its rails and seek an alternative line for its needs;[152] instead, the railroad company acted to sell the line to Montgomery County.[153]

The court explained further that "'[c]onveyance of property and abandonment of property are not consistent actions.'"[154] The conveyance in the present case, along with the railroad's interest in participating in a rails-to-trails program, supported a finding that the railroad wished to retain its interest in the right-of-way, allowing only an interim use of that right-of-way as a trail.[155] Moreover, the court found that by entering into an agreement for interim trail use, the railroad acted with the knowledge that the ICC retained jurisdiction.[156] The railroad, therefore, indefinitely delayed abandonment of the line, and it remained available should the railroad ever seek to

145. *Id.* at 176, 733 A.2d at 1090-91.

146. *Id.* at 175, 733 A.2d at 1090.

147. *Id.* at 171, 733 A.2d at 1088 (citing 49 U.S.C. §§ 11901, 11906, 11914 (1994) (providing a civil penalty of $5000 per violation and a criminal penalty up to $5000)).

148. *Id.* at 176, 733 A.2d at 1090-91.

149. *Id.*

150. *Id.* at 177-78, 733 A.2d at 1091-92.

151. *Id.* at 177, 733 A.2d at 1091-92.

152. *Id.* at 177-78, 733 A.2d at 1091.

153. *Id.* at 178, 733 A.2d at 1092.

154. *Id.* (quoting Vieux v. E. Bay Reg'l Park Dist., 906 F.2d 1330, 1341 (9th Cir. 1990)).

155. *Id.* at 178, 733 A.2d at 1092 (citing Birt v. Surface Transp. Bd., 90 F.3d 580, 587 (D.C. Cir. 1996) (characterizing a railroad's negotiation for an interim trail use as lacking a clear intent to abandon)).

156. *Id.* at 180, 733 A.2d at 1092-93.

resume service.[157] The court thus concluded that the railroad did not abandon its easement when it acted in accordance with federal regulations to seek approval for an interim trail use agreement.[158]

d. Judge Cathell's Dissent.—Judge Cathell disagreed with the conclusion reached by the majority concerning the third certified question.[159] Judge Cathell explained that the third question, regarding abandonment of the easement interest, should have been decided pursuant to Maryland property law, as if the federal regulatory framework did not exist.[160] According to Judge Cathell, the United States Court of Appeals for the Federal Circuit sought guidance from the Court of Appeals of Maryland in understanding Maryland law on abandonment.[161] The Federal Circuit is capable of determining how federal statutes and regulations impact the final disposition of the contested property without input from the Maryland court.[162] According to the dissent, to explore how federal law impacts property rights under Maryland law constitutes "reverse boot strapping" and creates a scenario in which an unconstitutional taking of property is impossible.[163]

Taking the federal regulations out of the analysis, Judge Cathell asserted that the railroad had lost its interest in the easement because it had ceased using the railroad corridor in 1985, it had passed resolutions expressing a desire to abandon the easement, and it had filed a petition with the ICC for approval of the abandonment.[164] The dissent found that these actions—along with the railroad's failure to repair a damaged bridge along the corridor—were sufficient to communicate an intent to abandon the easement.[165]

4. Analysis.—In *Chevy Chase Land Co. v. United States*, the Court of Appeals encouraged future conversions of railroad corridors to recreational trails by misapplying property law and by giving excessive deference to the Rails-to-Trails Act. The court focused on the transportation nature of the converted hiker/biker trail rather than its rec-

157. *Id.*, 733 A.2d at 1093. The court explained that once a rails-to-trails agreement takes effect, service may still be reactivated by federal regulators, which supported the conclusion that the right-of-way had not been abandoned. *Id.*

158. *Id.* at 182-83, 733 A.2d at 1094.

159. *Id.* at 184, 733 A.2d at 1095 (Cathell, J., dissenting).

160. *Id.* at 185, 733 A.2d at 1095.

161. *Id.*

162. *Id.*

163. *Id.* (internal quotation marks omitted).

164. *Id.* at 187-88, 733 A.2d at 1097.

165. *Id.* at 193, 733 A.2d at 1100.

reational value,[166] allowing itself to find that the adapted use was within the scope of the original easement. The court also relied on a case for a seldomly cited proposition to support a finding that railroads entering into rails-to-trails agreements have effectively disclaimed an intent to abandon.[167] Finally, the court applied the Rails-to-Trails Act in a way that makes a finding of abandonment nearly impossible under Maryland property law when a railroad is in compliance with federal railroad regulations.[168] Overall, the court diminished traditional principles of property law through an approach that expansively interprets railroad easements to allow all forms of transportation and encourages the creation of hiker/biker trails under the Rails-to-Trails Act.

a. Overemphasis of the Transportation Function of the Adapted Easement Allowed the Court to Uphold the Hiker/Biker Trail as Within the Easement's Scope.—In *Chevy Chase*, the court focused on the easement's transportation function rather than the adapted easement's recreational value to find that the hiker/biker trail maintained the easement's original transportation purpose.[169] By characterizing the easement as a public highway,[170] the court explained that the overriding factor in determining whether a new use is within the scope of a public highway easement is whether the new use generally serves the transportation purpose for which the easement was first acquired.[171] When relying on the public highway cases, the court failed to consider that public highway easements tend to support technological advancements in transportation.[172] Adapting the use of a public highway ease-

166. *See Chevy Chase*, 355 Md. at 154, 733 A.2d at 1078 ("The fact that the right-of-way may be used for recreational as well as transportation purposes has no bearing on our analysis, since the 'recreation' involved—biking and hiking—consists of the enjoyment one may have in transporting oneself.").

167. In *Chevy Chase*, the court found that the factual scenario in *Canton Co. v. Baltimore & Ohio Railroad Co.*, 99 Md. 202, 57 A. 637 (1904), presented a stronger case for abandonment. *See Chevy Chase*, 355 Md. at 178, 733 A.2d at 1092. The *Canton* court nonetheless found the evidence insufficient to support a finding of abandonment. *Canton*, 99 Md. at 221, 57 A. at 640.

168. *See Chevy Chase*, 355 Md. at 181, 733 A.2d at 1093 (holding that evidence of actions by the railroad company taken to comply with federal law cannot support a finding of abandonment under Maryland property law).

169. *See id.* at 154, 733 A.2d at 1078.

170. *See id.* at 147-50, 733 A.2d at 1075-76.

171. *Id.* at 148, 733 A.2d at 1075 (quoting Poole v. Falls Rd. Elec. Ry. Co., 88 Md. 533, 537, 41 A. 1069, 1071 (1898)).

172. *See infra* notes 178-191 and accompanying text (describing the line of Maryland cases supporting the adaptive use of public highway easements for new and advanced modes of transportation).

ment for self-powered recreational hiking, running, and biking can hardly be characterized as a technological advancement.

Moreover, holding that the hiker/biker trail is an adaptation permitted under a public highway easement distorts Maryland case law in order to achieve a predetermined result. This creates a poorly conceived framework upon which future Maryland courts will improperly rely to uphold hiker/biker trail conversions. The court conferred great influence on the concept of public highway easements by deeming the essential purpose of the hiker/biker trail to be transportation. In doing so, the court diminished the nature of past case law which tends to support adaptation of public highway easements only as new technologically-advanced uses arise. As a result, the court removes an essential characteristic of the public highway cases in favor of finding that the hiker/biker trail maintains the transportational nature of the easement which is "used for all purposes by which the object of its creation, as a public highway, could be promoted."[173] Moreover, by finding the hiker/biker trail's primary purpose to be transportation, the court eliminated an otherwise legitimate challenge to the trail. If the court instead emphasized the recreational value of the hiker/biker trail, then the public highway cases would have been of no use, leaving the court little choice but to find that the easement had been abandoned. In the end, the Court of Appeals provided a foundation for future rail-to-trail conversions by a distorted finding that the adapted use was transportation rather than recreation.

The public highway line of cases initiated by *Peddicord v. Baltimore, Catonsville & Ellicott's Mills Passenger Railway Co.*,[174] tends to involve advancements in the nature of transportation—from dirt road, to horse-drawn railway, to railroad or trolley lines.[175] In *Chevy Chase*, the court took a step backward by upholding a supposed advancement of a public highway easement to the most primitive means of transportation—walking and biking.[176] The *Chevy Chase* court stretched reasoning and common sense when it asserted that the original parties, aware at the easement's creation that a public highway easement was being conveyed, could have contemplated that the regression of the property to a simple walking path would constitute the type of adapta-

173. *Chevy Chase*, 355 Md. at 150, 733 A.2d at 1077 (quoting Peddicord v. Balt., Catonsville & Ellicott's Mills Passenger Ry. Co., 34 Md. 463, 481 (1871)).

174. 34 Md. 463 (1871).

175. *See infra* notes 178-191 and accompanying text.

176. *Chevy Chase*, 355 Md. at 150-51, 733 A.2d at 1076-77.

tion and advancement in use as contemplated by the public highway cases.[177]

The bulk of public highway cases do not tend to support reversion of public highway corridors to simpler means of transportation. For example, in *Peddicord*, the court deemed the adaptation of a public highway easement originally used as a turnpike road[178] to a horse railway allowing the travel of horses, carriages, and wagons[179] to have been legally contemplated by the parties to the original acquisition and grant.[180] The *Peddicord* court relied on the notion of legal contemplation to ensure that the public highway would adapt to those transportation needs as they arose and to allow "a new adaptation of its original use to the advancement of public convenience—to a more comfortable and more economical enjoyment of it by the public as a highway."[181]

In *Green v. City & Suburban Railway Co.*,[182] the court focused on the public benefit of adapting an existing public road to a more modern means of transportation.[183] Citing *Peddicord*'s reliance on the concept of legal contemplation,[184] the court found that the installation of an electric railway along a portion of a public road was permitted as merely a new means of powering public travel.[185] The court explained:

> It is doubtless true, that neither the Legislature of 1787, nor the property owners from whom the lands on which the road is built were obtained, contemplated the building of a railway on this road—especially one on which cars were to be moved by the use of electricity, but it is equally true that the law would not require this to be continued as 'a dirt road' simply because it was originally constructed in that way. This road well illustrates the progress that has been made within the past century. At first it was a poorly constructed dirt

177. *See id.*

178. *Peddicord*, 34 Md. at 471-72 (describing the legislative acts creating the road).

179. *Id.* at 477 (describing the authorization of a horse passenger railway along the turnpike road bed).

180. *Id.* at 480-81; *see also id.* (explaining that the parties looked to the future as well as to the present in considering to what uses the public highway may be put).

181. *Id.* at 481.

182. 78 Md. 294, 28 A. 626 (1894).

183. *Id.* at 306-07, 28 A. at 629.

184. *See Peddicord*, 34 Md. at 481 (identifying the concept of legal contemplation as allowing improvements to an existing easement that are consistent with the original purpose).

185. *Green*, 78 Md. at 307, 28 A. at 630 (1894) (finding that the use of a public street for electric street cars was "in no manner inconsistent with the uses and purposes for which streets were opened and dedicated as ways for public travel").

> road, then it became a turnpike, then part of its right of way was occupied by a horse car railway, which, in its turn, must now give way to *an improved method* of travel on public highways.[186]

Thus, the court focused on the need to allow an expansive use of the public road to ensure progress and growth; it did not limit its analysis after merely finding that the adapted use provided for transportation.

In other opinions, the Court of Appeals found that the adaptation of a pubic highway easement to a new mode of transportation should be upheld because it serves the public's transportation needs and encourages a more efficient and more organized means of travel. For example, in *Poole v. Falls Road Electric Railway Co.*,[187] the court found that the construction of tracks and poles and wires for electric street cars served the public's interest in improved transit, overcoming any inconvenience caused by the construction or operation of the street cars.[188] Additionally, in *Baltimore County Water & Electric Co. v. Dubreuil*,[189] the court reviewed several Maryland cases involving easements adapted to allow new modes of transportation.[190] In concluding this review, the court stated:

> [W]e have been governed by the fact that such [adapted] uses, of both streets and rural highways, were only new modes of travel and transportation, and the right, originally acquired . . . was . . . for all such [uses] as might arise in the ordinary course of improvement.[191]

The *Chevy Chase* court's finding that the easement's use for a hiker/biker trail maintains the public highway easement relied too heavily on the transportation nature of the easement without considering that the precedent set in public highway cases intended to foster *advancements* in transportation. The court found that use of a railroad corridor for walking, running, in-line skating, or biking does not constitute a use that was outside the scope of what was legally contem-

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186. *Id.* at 306, 28 A. at 629 (emphasis added).

187. 88 Md. 533, 41 A. 1069 (1898).

188. *Id.* at 539, 41 A. at 1072.

189. 105 Md. 424, 66 A. 439 (1907).

190. *Id.* at 429-31, 66 A. at 440-41.

191. *Id.* at 431, 66 A. at 441 (referring to Lonaconing Midland & Frostburg Ry. Co. v. Consol. Coal Co., 95 Md. 630, 53 A. 420 (1902); *Green*, 78 Md. 294, 28 A. 626 (1894); Koch v. N. Ave. Ry. Co., 75 Md. 222, 23 A. 463 (1892); Hodges v. Balt. Union Passenger Ry. Co., 58 Md. 603 (1882); Hiss v. Balt. & Hampden Passenger Ry. Co., 52 Md. 242 (1879); Peddicord v. Balt., Catonsville & Ellicott's Mills Passenger Ry. Co., 34 Md. 463 (1871)).

plated by the parties at the time of the conveyance.[192] In so holding, the court makes it easier for courts in the future to preserve a hiker/biker trail conversion under an easement originally granted to a railroad.[193] The court broadens the concept of legal contemplation, diminishing the likelihood that recreational hiker/biker trails, primarily characterized as serving a transportation purpose, will ever be found to be outside the easement's scope.

By giving little consideration to the hiker/biker trail's recreational purpose, the court side-stepped a potential pitfall capable of forcing a finding that the easement was abandoned. The *Chevy Chase* court would have faced a dilemma similar to that in *AT&T v. Pearce*[194] had it concluded that the primary purpose of the hiker/biker trail was recreation rather than transportation. In *Pearce*, the court determined that the condemnation of a public right-of-way for one public service corporation—a railroad—could not be turned over to the service of another public service corporation for the laying of telephone and telegraph lines.[195] This altered use did not serve the purpose for which the easement was originally intended and thus was not upheld.[196] Likewise, when a railroad corridor is converted to a hiker/biker trail, a finding that the primary purpose of the adapted use is recreation rather than transportation could make it more difficult to characterize the new use as serving the public transportation purposes for which the easement was first created.[197] To characterize the adapted use of the easement as recreational would take the new use

192. *Chevy Chase*, 355 Md. at 151, 733 A.2d at 1077 (finding that the change to a hiker/biker trail is a permissible change in instrumentality of the easement); *see also* Wright & Hester, *supra* note 86, at 451-52 (discussing the court's reasoning that the hiker/biker trail was within the legal contemplation of the parties as a use promoting public transportation).

193. *See* Joshua M. Pitcock, Note, Chevy Chase Land Co. v. United States*: The Rails-to-Trails Act and Maryland Property Law*, 35 WAKE FOREST L. REV. 729, 745-47 (2000) (asserting that the Maryland Court of Appeals's decision supports future rails-to-trails projects).

194. 71 Md. 535, 18 A. 910 (1889).

195. *Id.* at 552, 18 A. at 916.

196. *Id.* at 551-52, 18 A. at 915-16 (finding that the communication lines imposed an additional servitude); *see also Dubreuil*, 105 Md. at 431-32, 66 A. at 441-42 (interpreting the court's holding in *AT&T v. Pearce* and stating that "[w]hen the railroad company condemned its rights of way it could not have entered the minds of the parties that the owners were being compensated for such a use of the land [to lay telegraph and telephone lines] as was then attempted").

197. *See* Wright & Hester, *supra* note 86, at 447 (identifying the potential difficulty in perceiving a converted hiker/biker trail as a form of transportation rather than recreation).

outside of those uses legally contemplated by the deed's original parties and impose a new servitude on the easement.[198]

While the court in *Chevy Chase* found that the conversion of the railroad easement to a hiker/biker trail was similar to the conversion of a public highway easement, a closer examination could reveal that the trail is in fact used primarily for recreation rather than transportation.[199] The public easement granted by the land company to the railroad is similar to the easement examined in *Preseault v. United States.*[200] There, the United States Court of Appeals for the Federal Circuit applied common-law property principles to find that the conversion of an easement granted originally to transport goods and people by railroad to a new use as a hiker/biker trail was not contemplated by the original parties.[201] The court in *Chevy Chase* dismissed the importance of such a use distinction by stating that "[t]he fact that the right-of-way may be used for recreational as well as transportation purposes has no bearing on our analysis, since the 'recreation' involved—biking and hiking—consists of the enjoyment one may have in transporting oneself."[202]

Based on the depiction by the *Chevy Chase* court of the converted trail's recreational purpose as a reasonable burden incident to the pri-

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198. *See* Reid v. Wash. Gas Light Co., 232 Md. 545, 550-51, 194 A.2d 636, 639 (1963) (holding that the alteration of the instrumentality of the easement by replacing an existing pipeline with a larger one in such a way that did not require additional trenches was contemplated by the original parties and thus did not impose a new servitude on the easement).

199. The court in *Chevy Chase* dismissed this possibility by stating, "the 'recreational' use is limited to those uses involving *transportation* itself, including biking, running, and walking, each of which involves moving from one place to another." *Chevy Chase,* 355 Md. at 154, 733 A.2d at 1079.

200. 100 F.3d 1525 (Fed. Cir. 1996).

201. *Id.* at 1542-43. The court explained:

> Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage is clearly different. In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of goods and people for compensation. In the other [hiker/biker trail], the easement belongs to the public, and is open for use for recreational purposes, which happens to involve people engaged in exercise or recreation on foot or on bicycles. It is difficult to imagine that either party to the original transfers had anything remotely in mind that would resemble a public recreational trail.

Id.

202. *Chevy Chase,* 355 Md. at 154, 733 A.2d at 1078. The court also found that the use of the right-of-way for a hiker/biker trail "is of the same nature as the public railway in existence for some 90 years, *i.e.*, the use involves the passage over land consistent with the needs of the public." *Id.* at 151, 733 A.2d at 1077; *see also* Wright & Hester, *supra* note 86, at 452-53 (describing as insignificant the competing transportation or recreation characterizations of an adapted hiker/biker trail).

mary transportation purpose, future courts will likely find that recreation trails fall within the scope of an easement originally dedicated, but not limited, to railroad transportation purposes.[203] As a result, courts will not be limited by the function of the easement at the time of its creation.[204] In this way, the *Chevy Chase* court extended the scope of a public highway easement by finding that the hiker/biker trail, as a means of transportation rather than an advancement in transportation, was within the "legal contemplation" of the parties to the conveyance.[205] Moreover, the court's limited treatment of the recreational nature of the hiker/biker trail distorts the prevalent purpose of the adapted use in favor of a finding that the trail maintains the easement's transportation purpose.

b. The Court Relied on an Infrequently Cited Proposition in Canton *for a Finding of No Abandonment.*—In an ancillary discussion, the court examined whether the easement would have been abandoned if it had been limited solely to railroad purposes.[206] Case law regarding railroad line abandonment generally requires an intent to abandon the easement plus an overt act.[207] These cases often involve scenarios in which a railroad's removal of tracks and exclusive use of a different line constitute the intent and overt acts necessary to find abandonment.[208] The *Chevy Chase* court, however, found factually significant support in *Canton Co. of Baltimore v. Baltimore & Ohio Railroad Co.*,[209] a case that falls outside the commonly relied upon cases on abandonment. In that case, the Baltimore & Ohio Railroad Company (B&O) ceased using a railroad easement granted by the Canton Company because it was not, at that time, economically feasible to continue using the easement.[210] B&O removed the tracks from the easement and

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203. *Cf.* Wright & Hester, *supra* note 86, at 451-52 (assessing the Maryland court's holding in *Chevy Chase* as "hopefully, [the] final word on rail-trail conversions").

204. Instead courts may uphold uses that incorporate new functions supportive of the easement's original use. *See* Peddicord v. Balt., Catonsville & Ellicott's Mills Passenger Ry. Co., 34 Md. 463, 480-81 (1871) (finding that the adaptation of an easement originally dedicated as a turnpike road to a newly developed use as a railway track was legally contemplated).

205. *Chevy Chase*, 355 Md. at 150, 733 A.2d at 1076 (holding that a use that is consistent with the "essential nature" of deed language is a "reasonable use of a general right of way").

206. *See id.* at 158-83, 733 A.2d at 1081-94.

207. Vogler v. Geiss, 51 Md. 407, 410 (1879).

208. *See, e.g.*, Md. & Pa. R.R. Co. v. Mercantile-Safe Deposit & Trust Co., 224 Md. 34, 39, 166 A.2d 247, 250 (1960) (holding that removal of the rails and ties from a right of way constituted an abandonment).

209. 99 Md. 202, 57 A. 637 (1904).

210. *Id.* at 215, 220, 57 A. at 638, 639.

used tracks on a separate parcel of land.[211] The *Canton* court, however, did not find that these acts manifested the requisite intent to abandon.[212] Rather, a B&O executive expressed a definitive intent not to abandon, explaining that abandonment would be "a very unwise thing to do."[213]

Most Maryland cases find that the discontinuation of service and removal of rail track is sufficient to communicate an intent to abandon an easement for railroad purposes.[214] *Canton*, however, is distinguishable from these cases because, although the railroad discontinued rail service, removed the tracks, and used an entirely different line, it had imminent plans to reactivate service along the railroad corridor at issue.[215] These plans prevented the *Canton* court from finding abandonment of the easement.[216] The *Chevy Chase* court relied on *Canton* for the notion that absent an "unequivocal act of the owner inconsistent with the continued existence of the easement, or unless the nonuse has been for a considerable period," an intent to abandon will be found.[217] The references to *Canton* by Maryland courts tend to address more general elements regarding the abandonment of easements. None of these cases cite *Canton* for the purpose of finding that acts of abandonment were negated by the easement holder's actions to the contrary.[218] Thus, the court's reliance on *Canton* is somewhat misplaced.

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211. *Id.* at 214-15, 57 A. at 637.

212. *Id.* at 220-21, 57 A. at 640 (providing the rationale behind the court's finding that B&O did not intend to abandon the right-of-way).

213. *Id.* at 215, 57 A. at 638. B&O wished to retain the easement for future use when an increase in business would require use of the additional lines. *Id.* The court stated:

> It would appear to be entirely unreasonable to hold that a mere non-user could have that effect [of abandonment of an easement]; because to so hold, would make it impossible for a corporation to make any provision for the future by securing more property than was then required but would be needed thereafter.

Id. at 217, 57 A. at 638.

214. *See, e.g.*, Md. & Pa. R.R. Co. v. Mercantile-Safe Deposit & Trust Co., 224 Md. 34, 39, 166 A.2d 247, 250 (1960) (finding that the removal of rails and ties from a railroad corridor sufficiently expressed an intent to cease using the easement for a public transportation purpose).

215. *Canton*, 99 Md. at 215, 57 A. at 638 (recounting evidence that the railroad company would soon use the inactive railway).

216. *Id.* at 217, 57 A. at 638.

217. *Chevy Chase*, 355 Md. at 177, 733 A.2d at 1091.

218. *See, e.g.*, D.C. Transit Sys., Inc. v. State Roads Comm'n of Md., 259 Md. 675, 690, 270 A.2d 793, 801 (1970) (citing *Canton* for the general rule that an easement provided to a quasi-public corporation will be preserved only when that easement continues to be used for a public purpose); E. Wash. Ry. Co. v. Brooke, 244 Md. 287, 293, 223 A.2d 599, 603 (1966) (directing the reader to contrast *Canton* with other cases finding an abandonment of an easement based upon acts and affirmative testimony indicating a desire to abandon); Green v. Pa. R. Co., 141 Md. 128, 132, 118 A. 127, 128 (1922) ("Intention is an essential

The *Chevy Chase* court failed to adequately distinguish *Canton*, a case in which the railroad could readily and imminently foresee a time when the unused railroad line would be necessary.[219] In *Chevy Chase*, the railroad did not need any plans or intentions of reactivating rail service in order to enter a rails-to-trails agreement.[220] Under the Rails-to-Trails Act, these plans are not a prerequisite to entering into an agreement which indefinitely preserves the easement.

The *Chevy Chase* court should have remained true to the law set forth in *Maryland & Pennsylvania Railroad Co. v. Mercantile-Safe Deposit & Trust Co.*,[221] which required a "bona fide intent to preserve the right of way for *actual railroad use*" in order to prevent abandonment.[222] Instead, the court reasoned that the railroad company would have effectively disclaimed an intent to abandon an easement limited to railroad purposes on the basis of the railroad company's plans to participate in the rails-to-trails program.[223] The ICC maintains jurisdiction over the easement and can exercise an option to reactivate its prior use.[224] But the mere possibility that the ICC will exercise this option is speculative and distant.[225]

Under the holding in *Chevy Chase*, it seems that in future cases, railroads will be able to disclaim an intent to abandon by participating in the Rails-to-Trails program.[226] Again, this indicates another way in which the court has attempted to ensure that railroad easement con-

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element of abandonment."); Hagerstown & Frederick R.R. Co. v. Grove, 141 Md. 143, 146-47, 118 A. 167, 168 (1922) (citing *Canton* for repeating the standard that the abandonment of an easement may be found by acts or declarations sufficient to illustrate an intent to abandon). Only *D.C. Transit Systems* involved a fact pattern in which a railroad company sought to disclaim an intent to abandon. 265 Md. at 630, 290 A.2d at 812. The court in *D.C. Transit Systems* felt that this effort at disclaimer was too weak and speculative and, unlike *Canton*, unaccompanied by other evidence showing a lack of intent. *Id.* at 629-30, 290 A.2d at 812.

219. *See Canton*, 99 Md. at 221, 57 A. at 640 ("The evidence shows that the capacity of the Belt Line route has almost reached its limit, and when that has been exceeded the appellee must look to the Pratt Street or some other route to accommodate the excess.").

220. *See* 24 C.F.R 1152.29(a)(3) (2000) (requiring that the interim trail use be subject to only possible future reconstruction and reactivation for rail service).

221. 224 Md. 34, 166 A.2d 247 (1960).

222. *Id.* at 41, 166 A.2d at 251 (internal quotation marks omitted) (quoting People v. Ocean Shore R.R., 196 P.2d 570, 578 (Cal. 1948)).

223. *Chevy Chase*, 355 Md. at 170, 733 A.2d at 1087-88 (holding that the railroad acted consistently with an intent to participate in the Rails-to-Trails Act and inconsistently with an intent to abandon the easement).

224. *See* 16 U.S.C. § 1247(d) (1994).

225. *See* 49 C.F.R. 1152.29(a)(3) (requiring that the interim trail use be subject to only possible future reconstruction and reactivation for rail service).

226. *See Chevy Chase*, 355 Md. at 178, 733 A.2d at 1092 (stating that "a railroad's participation in a rails-to-trails program implies that it does not intend to fully abandon the line, but rather to retain the right-of-way while permitting interim trail use").

versions under the Rails-to-Trails Act will be protected when scrutinized under state property law.[227] Moreover, the *Chevy Chase* court's reliance on *Canton* indicates the court's willingness to give minimal regard to the bulk of Maryland easement law while placing disproportionate emphasis on the infrequently cited proposition that a railroad easement holder can affirmatively disclaim an intent to abandon.[228]

c. The Court's Interpretation of State Property Law as Impacted by Federal Regulation of Interstate Rail Carriers Reflects a Natural Tension.— Due to the pervasive nature of federal regulations and the introduction of the railbanking option to regulatory abandonment, the ICC has created a plan that compels compliance and gives railroads an easy way to act with the intent to retain an easement for potential future use.[229] As a result, the intent to abandon has little room to survive within the federal regulatory scheme, and state property law has minimal impact on the disposition of railroad easements under the Rails-to-Trails Act.

The court in *Chevy Chase* considered federal regulations in determining the railroad's intent to abandon its easement.[230] The court recognized that federal regulations greatly impact the application of state laws regarding railroad abandonment.[231] The 1920 amendments to the Interstate Commerce Act gave the ICC jurisdiction over railroad abandonments.[232] Property rights concerning railroad corridors are not affected by state law principles until federal jurisdiction over a corridor ceases.[233] The Rails-to-Trails Act was enacted to assist the federal government in fostering and protecting the nation's transportation infrastructure by providing an alternative to abandonment of

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227. *See id.* at 180-81, 733 A.2d at 1093 (identifying the policy reasons for finding that an attempt to comply with the Rails-to-Trails Act disproves an intent to abandon).

228. *See supra* notes 214-222 and accompanying text.

229. *See* 16 U.S.C. § 1247(d) (1994) (recognizing the national policy of maintaining railroad easements for reactivation of rail service).

230. *See Chevy Chase*, 355 Md. at 168-69, 733 A.2d at 1086-87 (asserting that the railroad's compliance with federal regulations does not express an intent to abandon the easement); *see also supra* note 218 and accompanying text (addressing the impact that a lack of intent has on a finding of abandonment).

231. *See Chevy Chase*, 355 Md. at 162-63, 733 A.2d at 1083 (addressing the complexities of federal regulation in determining whether a railroad line can be abandoned).

232. *See* Transportation Act of 1920, ch. 91, § 402(18), 41 Stat. 456, 477-78 (1920) (creating exclusive federal jurisdiction over railroad abandonments); *see also* Sennewald, *supra* note 85, at 1402-05 (providing a history of federal regulation of railroad abandonment and preemption of state law).

233. *See* Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 323 (1981) (refusing to recognize claims under state law because the ICC possessed exclusive jurisdiction over railroad abandonments).

easements.[234] As an alternative to abandonment, Congress created the additional option of "railbanking."[235] By allowing the railroad company to enter into an agreement for an interim use of the railroad corridor—typically a hiker/biker trail—the corridor can be held in an indefinite railbank over which the ICC continues to exercise authority.[236] This continued authority grants the ICC the option of reintegrating the railroad corridor into the nation's railroad infrastructure if the need should again arise.[237] To permit state property law to interfere with this process would inhibit the federal government's mission.[238] To characterize the railroad company's obligatory filing of an application for regulatory abandonment as evidence of abandonment under state law would make it impossible to implement the Rails-to-Trails Act.[239]

Nonetheless, principles of state property law must survive. In her concurring opinion in *Preseault v. Interstate Commerce Commission*,[240] Justice O'Connor stressed the inviolability of state property law with regard to determining the status of property interests:

> Although the [ICC's] actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests. . . . Any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.[241]

While the court in *Chevy Chase* was correct in its assessment that the status of a railroad easement cannot be determined in a vacuum,

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234. *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 18 (1990) (recognizing Congress's intent to preserve established railroad rights-of-way for future use as a valid objective); *see also* Wright & Hester, *supra* note 86, at 385-86, 462 (discussing the public's interest in preserving railroad corridors for public use).

235. 16 U.S.C. § 1247(d) (1994); *see also* Wright & Hester, *supra* note 86, at 453-59 (explaining the concept of railbanking introduced by 16 U.S.C. § 1247(d) and the permitted interim uses).

236. *See* 16 U.S.C. § 1247(d).

237. *See* Wright & Hester, *supra* note 86, at 462.

238. *See* Sennewald, *supra* note 85, at 1420 ("Permitting state law to determine the disposition of property interests denies the federal government its ability to determine which lines are necessary for present and future rail use.").

239. *See Chevy Chase*, 355 Md. at 175-76, 733 A.2d at 1090-91 (describing the "irreconcilable dilemma for railroads wishing to pursue rails-to-trails agreements or otherwise dispose of their property interests in right-of-ways").

240. 494 U.S. 1, 20-25 (1990) (O'Connor, J., concurring).

241. *Id.* at 22.

it allowed the federal regulations to overshadow state property law.[242] As a result, it is difficult to contemplate a situation in which an easement would be found to have been abandoned under state property law, but maintained by virtue of the Rails-to-Trails Act.[243] In *Chevy Chase,* Judge Cathell dissented on the basis that the majority had determined the abandonment question according to federal law.[244] He made a distinction between the property interest and railroad service: the property interest can be abandoned before railroad service abandonment is approved by the federal government.[245] In his argument, Judge Cathell attempted to respect Justice O'Connor's warning; his approach, however, has the potential to thoroughly frustrate the efforts of the Rails-to-Trails Act.[246] Under Judge Cathell's approach, a railroad company that took steps to enter into an agreement to use a railroad easement for other purposes until reactivation of railroad service would have abandoned the easement under state law.[247] Judge Cathell's analysis failed to consider that the railroad acted according to its own interest in preserving the railroad corridor for future use. As the *Chevy Chase* majority stated, to presume that a railroad company is acting in such a manner as to communicate an intent to abandon would be to presume that the railroad company wishes to forego the potential reactivation of the railroad corridor should the need and opportunity arise.[248]

5. Conclusion.—Overall, the Court of Appeals in *Chevy Chase* provided support for future conversions of railroad corridors to hiker/biker trails under the Rails-to-Trails Act. The court found that, as a public highway easement, the corridor was adaptable to all uses within the legal contemplation of the original parties and supportive of public transportation. In doing so, the court emphasized the transportation nature of the hiker/biker trail over its recreational attributes.

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242. *See Chevy Chase,* 355 Md. at 181, 733 A.2d at 1093 (characterizing compliance with federal law as effective avoidance of abandonment).

243. *But see id.* (stressing that the court does not "intend to intimate that a railroad may never abandon an easement under Maryland law prior to federal regulatory approval of abandonment).

244. *Id.* at 184, 733 A.2d at 1095 (Cathell, J., dissenting).

245. *Id.* at 194, 733 A.2d at 1100.

246. *See* Emily Drumm, *Addressing the Flaws of the Rails-to-Trails Act,* 8 KAN. J.L. & PUB. POL'Y 158, 162 (1999) (discussing Justice O'Connor's assertion that state property rights remain intact despite continued ICC jurisdiction).

247. *See Chevy Chase,* 355 Md. at 175-76, 733 A.2d at 1090 (illustrating actions taken in compliance with ICC regulations which could be construed as evidence of abandonment).

248. *See id.* at 180, 733 A.2d at 1092-93 (citing the continued availability of an easement conveyed as temporary trail for reinstitution as a railroad corridor).

Additionally, the court relied on *Canton Co. of Baltimore v. Baltimore & Ohio Railroad Co.* to support the notion that the railroad had acted to preserve the use of the easement for future reactivation. In doing so, the court failed to recognize that *Canton* is rarely cited for this proposition. Moreover, *Canton* is distinguishable from *Chevy Chase* because the plans for reactivation in *Chevy Chase* were remote and speculative.

Finally, the court's analysis gives greater consideration to the federal regulatory framework impacting the abandonment of railroad corridors. However, the court avoided frustrating the purposes of the Rails-to-Trails Act at the expense of Maryland property law. While the court's decision preserves Maryland's portion of the extensive national network of railways for future reactivation and provides society an opportunity to enjoy them in the interim, in the future, Maryland law will be applied in a way that supports railroad conversions at the expense of the fee owners' property rights.

AMY M. MCCLAIN

Recent Decisions

The United States Court of Appeals for the Fourth Circuit

I. CONSTITUTIONAL LAW

A. The Fourth Circuit's Unsuccessful Attempt to Make Sense of the Supreme Court's Confusing Abortion Jurisprudence

In *Greenville Women's Clinic v. Bryant*,[1] the United States Court of Appeals for the Fourth Circuit upheld the constitutionality of a South Carolina regulation that provided detailed requirements for the licensing of any "'facility in which any second-trimester or five or more first-trimester abortions are performed in a month.'"[2] The court upheld the regulation on both due process and equal protection grounds,[3] reasoning that the state had a valid interest in women's health.[4] The court also determined that the regulation did not unduly burden a woman's abortion choice[5] and concluded

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1. 222 F.3d 157 (4th Cir. 2000), *cert denied*, 531 U.S. 1191 (2001).

2. *Id.* at 160 (quoting S.C. CODE ANN. § 44-41-75(A) (Law. Co-op. Supp. 1999)). The regulation was promulgated as a result of an amendment to South Carolina's then existing abortion statute, which only required licensing of those clinics that performed second-trimester abortions. *Id.* at 159-60; *see* 24 S.C. CODE ANN. REGS. 61-12 (2000) (setting forth the text of the regulation); S.C. CODE ANN. §§ 44-41-20(b) to -70(b) (Law. Co-op. 1985) (setting forth South Carolina's then-existing abortion statute). Pursuant to this amendment, the legislature directed the Department of Health and Environmental Control (DHEC) to "promulgate regulations concerning sanitation, housekeeping, maintenance, staff qualifications, emergency equipment and procedures to provide emergency care, medical records and reports, laboratory procedure and recovery rooms, physical plant, quality assurance, infection control, and information on and access to patient follow-up care necessary to carry out the purposes [of the statute]." *Greenville*, 222 F.3d at 160 (quoting S.C. CODE ANN. § 44-41-75(B) (Law. Co-op. Supp. 1999)). The DHEC responded by promulgating Regulation 61-12. 24 S.C. CODE ANN. REGS. 61-12; *Greenville*, 222 F.3d at 160.

3. *Greenville*, 222 F.3d at 159; *see* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

4. *Greenville*, 222 F.3d at 159.

5. *Id.* The clinics argued that the requirements were unnecessary and more likely to harm than to protect the health of abortion patients, and that the national standards on which the requirements were based were neither designed to serve as mandatory directives nor appropriate for that purpose. *Id.* at 163. They also challenged the notion that the DHEC was motivated by a genuine concern for protecting the health of such women. *See id.* at 188 (Hamilton, J., dissenting) (explaining that the district court found that the DHEC demonstrated a lack of interest in ensuring that Regulation 61-12 actually met the goal of promoting maternal health). However, the court accepted the State's assertion that the Regulation, which is based largely on national healthcare standards, is rationally related to protecting the health of women and that compliance would serve to improve the quality of medical care for women seeking abortions. *Greenville*, 222 F.3d at 163.

that the legislature had a rational basis for regulating abortion clinics.[6]

Although the court's result in upholding the regulation was significant in that it reflected the Fourth Circuit's validation of a new strategy used by states to regulate abortions, its process in arriving at that decision was of more consequence than the outcome. Given the three-judge panel's disagreement over the threshold issue of the appropriate standard for evaluating facial due process challenges, the *Greenville* decision highlights the confusion that has resulted from the Supreme Court's lack of guidance in this area. The majority's adherence to the "no set of circumstances" standard set forth in *United States v. Salerno*[7] represents a misapplication of Fourth Circuit precedent. By contrast, the dissent's reliance on *Planned Parenthood v. Casey*'s[8] undue-burden standard accurately characterizes the Supreme Court's most recent abortion holdings. Further, the drastic differences between the majority's and dissent's undue-burden analyses demonstrate the great need for clarification by the Court. Ultimately, without further guidance from the Supreme Court, facial due process challenges to abortion regulations will remain result-oriented decisions in which different philosophical interpretations of the appropriate standard always will justify the court's decision.

1. The Case.—Prior to 1995, South Carolina only required licensing of physicians' offices or other facilities in which second-trimester abortions were performed.[9] On January 3, 1995, South Carolina's legislature amended its abortion statute to require licensing by the Department of Health and Environmental Control (DHEC) of not only facilities in which second-trimester abortions were performed, but also those in which five or more first-trimester abortions were performed each month.[10] The legislature specifically required DHEC to promul-

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6. *Greenville*, 222 F.3d at 174. The court's equal protection analysis rejected the lower court's decision, which held that the regulation failed under either a strict scrutiny or rational basis standard of review. *See id.* at 173. The court instead found it only necessary to apply the rational-basis standard. *Id.* This Note will not focus on the court's equal protection analysis, but instead will only discuss the debate regarding the appropriate standard for facial due process challenges.

7. 481 U.S. 739 (1987).

8. 505 U.S. 833 (1992).

9. *Greenville*, 222 F.3d at 176 (Hamilton, J., dissenting); *see* S.C. CODE ANN. §§ 44-41-20(b) to -70(b) (Law. Co-op. 1995), *amended by* S.C. CODE ANN. § 44-41-75(A) (West Supp. 1999).

10. S.C. CODE ANN. § 44-41-75(A) (West Supp. 1999); *Greenville*, 222 F.3d at 176 (Hamilton, J., dissenting). The parties provided no evidence to suggest that any abortion providers in South Carolina perform elective abortions in the second trimester of pregnancy, making the numerical distinction seem irrelevant. *Greenville*, 222 F.3d at 177 (Hamilton, J.,

gate regulations that set forth detailed requirements that abortion clinics had to meet to obtain and maintain a license to perform abortions.[11] Divided into ten parts, Regulation 61-12 set forth requirements that govern every aspect of abortion clinics' operation, including: "Administration and Management," "Patient Care," "Medical Records and Reports," "Functional Safety and Maintenance," "Infection Control and Sanitation," "Fire Protection and Prevention," and "Design and Construction."[12]

On the day before Regulation 61-12 was intended to take effect, Greenville Women's Clinic,[13] Charleston Women's Medical Clinic,[14] and Dr. William Lynn,[15] brought an action seeking both declaratory and injunctive relief, claiming that Regulation 61-12 was unconstitutional on its face because it would violate their due process and equal protection rights, as well as those of their patients.[16] The plaintiffs brought suit against the Commissioner of DHEC, the Governor of South Carolina, and the Attorney General of South Carolina.[17] The

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dissenting). In addition, South Carolina does not require licensing of physicians' offices outside of the abortion context. *Id.* at 178.

11. S.C. CODE ANN. § 44-41-75(B) (West Supp. 1999); *Greenville*, 222 F.3d at 176 (Hamilton, J., dissenting). Regulation 61-12, entitled "Standards for Licensing Abortion Clinics," was created in response to this enabling legislation. 24 S.C. CODE ANN. REGS. 61-12 (2000).

12. 24 S.C. CODE ANN. REGS. 61-12.

13. The Greenville Women's Clinic, located in Greenville, South Carolina, provides gynecological services, including abortions through fourteen weeks of pregnancy. *Greenville*, 222 F.3d at 177 (Hamilton, J., dissenting). Two physicians, who are licensed to practice in South Carolina and board certified in obstetrics and gynecology, own and operate the Greenville Women's Clinic. *Id.* On average, approximately 2746 first-trimester abortions are performed at the clinic each year. *Id.*

14. Located in Charleston, South Carolina, the Charleston Women's Medical Clinic also provides gynecological services, including abortions through 12.5 weeks of pregnancy. *Id.* The Charleston Women's Medical Clinic performs an average of 2408 first-trimester abortions per year. *Id.*

15. Dr. Lynn, who was licensed to practice medicine in South Carolina and was board certified in obstetrics and gynecology, owned and operated two medical practices, one in Beaufort, South Carolina, and the other in Greenville, South Carolina. *Id.* As part of his practice, he performed abortions through 13.9 weeks of pregnancy. *Id.* He performed, on average, 407 first-trimester abortions per year in his Beaufort office and 536 per year in his Greenville office. *Id.*

16. *Id.* at 162. It is not unusual for physicians to bring such actions on behalf of their patients. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106, 118 (1976) (discussing the Supreme Court's willingness to allow a physician to have standing to assert the constitutional rights of women patients against governmental interference with the abortion decision); Okpalobi v. Foster, 190 F.3d 337, 353 (5th Cir. 1999) (holding that, based on the "Supreme Court's guidance in *Singleton*, . . . in the circumstances of this case . . . the Plaintiffs [providers of abortion services] have the requisite commonality and congruence with their patients' interests to establish standing to assert their right to make abortion decisions free of undue burden by the State of Louisiana").

17. *See* Greenville Women's Clinic v. Bryant, 66 F. Supp. 2d 691 (D.S.C. 1999).

United States District Court for the District of South Carolina granted the plaintiffs' motion for a temporary restraining order, and the parties subsequently agreed to continue the injunction pending a decision by the district court on the merits.[18]

Following a six-day bench trial, the district court held that Regulation 61-12 was unconstitutional on both due process and equal protection grounds.[19] Its decision was based on detailed findings concerning the probable effect of Regulation 61-12 on the health of women, the cost of obtaining a first-trimester abortion, and the availability of obtaining a first-trimester abortion in South Carolina.[20] With respect to the due process claim, the district court's analysis focused on the regulation's facial invalidity according to the standard set forth in *United States v. Salerno*,[21] and the undue-burden test set forth in *Planned Parenthood v. Casey*.[22] Rather than resolving which standard prevails, the district court's equal protection discussion demonstrated the regulation's invalidity under both the strict scrutiny test and the more lenient rational basis test.[23]

South Carolina appealed the district court's judgment. The United States Court of Appeals for the Fourth Circuit considered whether South Carolina's regulation establishing standards for licensing abortion clinics violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment by placing an undue

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18. *See id.* at 694.

19. *Id.* at 695. The court also held that the text of the regulation was not subject to the doctrine of severability and consequently invalidated the entire regulation. *Id.*

20. *Id.* at 730-37. The district court's findings were discussed at great length in Judge Hamilton's dissenting opinion, reflecting his criticism of the *Greenville* majority for setting aside the district court's decision "without identifying a single finding of fact made by [the court] as being clearly erroneous." *Greenville*, 222 F.3d at 176 (Hamilton, J., dissenting).

21. 481 U.S. 739 (1987).

22. 505 U.S. 833 (1992); *see Greenville*, 66 F. Supp. 2d at 727-37 (demonstrating the district court's inability to determine whether the Supreme Court intended to overrule *Salerno* when it created a new standard in *Casey*); *see also infra* notes 40-57 and accompanying text (explaining the applicability of *Salerno* in the abortion arena); *infra* notes 58-70 and accompanying text (discussing the Supreme Court's creation of a different standard in *Casey*). With respect to the *Salerno* "no set of circumstances" standard, the district court concluded that Regulation 61-12 was unconstitutional in all of its applications and therefore could not stand under *Salerno*. *Greenville*, 66 F. Supp. 2d at 736-37. The district court's analysis under the *Casey* standard resulted in the conclusion that the regulation did not serve, and was not designed to serve, the state's interest in maternal health, and that even if it did, the burdens it imposed upon abortion providers and patients constituted an undue burden on a woman's right to have an abortion prior to viability. *Id.* at 730, 735.

23. *Greenville*, 66 F. Supp. 2d at 737-43. The district court found that the regulation's categorization of abortion clinics based on the number of first-trimester abortions performed each month was "neither justified by actual differences nor rationally related to the state's legitimate interest in protecting the health and safety of women seeking first-trimester abortions." *Id.* at 743.

burden on women's decisions to seek abortions, and by distinguishing between clinics that perform a specified number of abortions and those that do not.[24]

2. *Legal Background.*—Beginning with *Roe v. Wade*[25] in 1973, the Supreme Court's entrance into the abortion arena has been the subject of considerable debate and controversy due to the strong emotions and conflicting values evoked when discussing the abortion issue.[26] Although *Roe* laid the foundation for the Court's abortion jurisprudence, subsequent cases have demonstrated the Court's difficulty in applying *Roe*'s principles.[27] The Supreme Court's decisions in *United States v. Salerno* and *Planned Parenthood v. Casey* changed the focus of abortion cases, leading lower courts to struggle further in determining whether *Casey*'s "undue-burden" standard replaced *Salerno*'s "no set of circumstances" test. The Supreme Court's unwillingness to resolve this debate has created confusion over the appropriate standard for facial challenges in the abortion context. The inconsistency within the Fourth Circuit over the applicable standard reflects the confusion that has resulted from the Supreme Court's lack of guidance.

a. Roe v. Wade*: A Fundamental Foundation.*—In *Roe v. Wade*, the Supreme Court recognized as fundamental a woman's right to end a pregnancy by aborting the life of the fetus.[28] The Court reasoned:

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24. *Greenville*, 222 F.3d at 159.

25. 410 U.S. 113 (1973).

26. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1537 (2000) (claiming that "[t]he [*Casey*] opinion expressed the apparent doubts of at least some of the Justices . . . about the correctness of *Roe* as an original matter and the morality of a constitutional right to abortion as a general proposition").

27. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 479-80 (1990) (Scalia, J., concurring in the judgment in part and dissenting in part) (commenting on the fractured nature of the Court's opinion and concluding that "[t]he random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job [devising an abortion code] are not to be found in the lawyer's—and hence not in the judge's—workbox"); Webster v. Reprod. Health Servs., 492 U.S. 490, 521 (1989) (plurality opinion) (explaining that "[s]ince the bounds of [*Roe*'s] inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine"); Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting) (describing *Roe* as "an analytical framework that varies according to the 'stages' of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs").

28. *Roe*, 410 U.S. at 155.

> The right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[29]

In recognizing the right to an abortion as fundamental, however, the Court also acknowledged that some state regulation in areas protected by the right of privacy is appropriate.[30] Relying on the standard it employed in reviewing challenges to regulations involving other fundamental rights, the Court suggested that a strict-scrutiny test be applied, under which the proponent of the regulation must demonstrate that there is a compelling state interest[31] and that the legislative enactment is "narrowly drawn to express only the legitimate state interests at stake."[32]

In addition to proposing a standard for evaluating the constitutionality of state abortion regulations, the Court in *Roe* adopted a trimester framework to clarify the point in a woman's pregnancy when each state interest becomes "compelling."[33] Drawing on the social, medical, and legal history of abortion, the Court held that the state's interest in protecting the health of the mother becomes compelling after the first trimester of pregnancy,[34] and that the interest in poten-

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29. *Id.*

30. *Id.* at 153-54.

31. *Id.* at 155 (citing Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963)). The *Roe* Court explained that in the abortion context, the state has an important and legitimate interest both in preserving and protecting the health of the pregnant woman, and in protecting the potential of human life. *Id.* at 163.

32. *Id.* at 155 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940)).

33. *Id.* at 164-65. The *Roe* Court explained that:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id.

34. *Id.* at 163.

tial human life becomes compelling at viability.[35] Therefore, after the first trimester, the state can regulate the abortion procedure to preserve and protect maternal health, and after viability, the state may proscribe abortion to protect the fetus, except when necessary to preserve the health of the mother.[36] Thus, the Court's decision in *Roe* enabled the state "to place increasing restrictions on abortion as the period of pregnancy lengthens so long as those restrictions are tailored to the recognized state interests."[37] Following *Roe*, the Supreme Court decided numerous abortion cases that revealed the inherent difficulties and widespread confusion among courts in attempting to apply *Roe*'s principles.[38]

b. An Appropriate Standard for Facial Challenges: Salerno*'s Unknown Origins and* Casey*'s Well-Grounded Roots.*—The Supreme Court's jurisprudence in the area of facial challenges to the constitutionality of statutes has been a source of confusion.[39] In *United States v. Salerno*,[40] which involved a challenge to the Bail Reform Act of 1984 rather than an abortion regulation, Chief Justice Rehnquist announced a new standard for reviewing facial challenges.[41] Chief Justice Rehnquist, recognizing the heavy burden that the Court was placing on opponents of legislation, explained that to succeed with a facial challenge, the challenger would have to demonstrate that "no set of circumstances" exists under which the Act would be valid.[42] The

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35. *Id.*

36. *Id.* at 163-64.

37. *Id.* at 165.

38. *Greenville*, 222 F.3d at 165; see *supra* note 27 for a list of such cases.

39. For a thorough discussion of facial challenges, see generally Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994). Professor Dorf explains that a court may declare a statute unconstitutional in one of two manners: the court may declare it invalid on its face, or it may find the statute unconstitutional as applied to a particular set of circumstances. *Id.* at 236. Professor Dorf further suggests that the significance of this distinction lies in the different consequences associated with each type of challenge. *Id.* If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application. *Id.* However, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances. *Id.*

40. 481 U.S. 739 (1987).

41. *Id.* at 745 (applying the "no set of circumstances" test to the Bail Reform Act of 1984 and finding that the statute was not facially invalid).

42. *Id.* "An exception to this rule was carved out for statutes which are violative on First Amendment free speech grounds under the overbreadth doctrine." Ruth Burdick, Note, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered, and the Split over the* Salerno *Test*, 23 HASTINGS CONST. L.Q. 825, 871 n.337 (1996) (citing Gooding v. Wilson, 405 U.S. 518, 520-23 (1972)). Chief Justice Rehnquist specifically noted that the overbreadth doctrine was limited to the context of the First Amendment. *Salerno*, 481 U.S. at 745.

Chief Justice further emphasized that the fact that a statute "might operate unconstitutionally under some conceivable set of circumstances [was] insufficient to render it wholly invalid."[43] Accordingly, under this "no set of circumstances" test, the proponent of the legislation need only produce one example in which the statute could be applied constitutionally to defeat the facial challenge.[44]

The Supreme Court applied the *Salerno* test to facial challenges on three subsequent occasions. First, in *Webster v. Reproductive Health Services*,[45] in which Justice O'Connor explicitly invoked the "no set of circumstances" test in a concurring opinion,[46] the Court upheld a Missouri law that prohibited the use of public facilities to perform abortions except when necessary to save the life of the mother.[47] The following year, in *Ohio v. Akron Center for Reproductive Health*,[48] the Court upheld a provision in Ohio's abortion statute that provided for a judicial-bypass procedure for a minor seeking an abortion without parental consent.[49] Writing for the Court, Justice Kennedy quoted *Webster*'s use of the *Salerno* language, noting that "because appellees are making a facial challenge to a statute, they must show that 'no set of circumstances exists under which the Act would be valid.'"[50] Finally, the Court's decision in *Rust v. Sullivan*[51] reflected the most clear application of the *Salerno* test.[52]

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43. *Salerno*, 481 U.S. at 745.

44. *See id.* For a criticism of this result, see Dorf, *supra* note 39, at 240. Professor Dorf's criticism focused on his assertion that,

> [w]hile a statute that "might operate unconstitutionally under some conceivable set of circumstances" could be facially valid, it hardly follows, as the Court implies, that a statute with a large number of obviously unconstitutional applications should be facially valid merely because there exists some set of circumstances, no matter how small or insignificant, under which the statute can be applied without violating a constitutional guarantee.

Id. Professor Dorf also criticizes the *Salerno* test on the grounds that the Court "cite[d] no direct authority to support its truly draconian standard." *Id.* at 239.

45. 492 U.S. 490 (1989).

46. *Id.* at 524 (O'Connor, J., concurring in part and concurring in the judgment) (quoting the language from *Salerno* as applicable to the present facial challenge).

47. *Id.* at 511.

48. 497 U.S. 502 (1990).

49. *Id.* at 506-07.

50. *Id.* at 514 (quoting *Webster*, 492 U.S. at 524 (O'Connor, J., concurring in part and concurring in the judgment)).

51. 500 U.S. 173 (1991).

52. *See id.* at 183 (citing directly to *Salerno* as the applicable standard for challenges to the facial validity of a law); *see also* John Christopher Ford, *The* Casey *Standard for Evaluating Facial Attacks on Abortion Statutes*, 95 MICH. L. REV. 1443, 1453 (1997) (explaining that "[t]he *Salerno* rule continued its ascent in *Rust v. Sullivan*," in which "[t]he Court cited the 'no-set-of-circumstances' standard at the beginning of its discussion, and remained aware throughout the opinion of the case's status as a facial attack").

In *Rust*, the Court held that federal regulations that restricted the ability of certain federal fund recipients to engage in abortion-related activities were not unconstitutional.[53] The Court focused its discussion on whether the regulations could be applied to a group of individuals without abridging their constitutionally protected rights.[54] The Court's analysis then restated the *Salerno* language and reiterated the heavy burden that the opponents of legislation faced in bringing a facial challenge.[55] Ultimately, the *Rust* Court upheld the regulations because "a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered."[56] Consistent with *Salerno*, the Court acknowledged that although some women's access to abortion would be abridged, they were in "no worse position than if Congress had never enacted Title X."[57]

Despite these three applications of the *Salerno* test, many of the Court's abortion cases—both prior to and following *Salerno*—include language reflecting the undue-burden standard finally adopted by the joint opinion in *Planned Parenthood v. Casey*.[58] In *Casey*, a divided Court struggled over whether to uphold various provisions of Pennsylvania's newly amended abortion statute.[59] The joint opinion of Justices O'Connor, Kennedy, and Souter effected two principle changes to the Supreme Court's abortion jurisprudence by rejecting the *Roe* trimester framework and replacing it with a new undue-burden standard.[60] Although the *Casey* Court reaffirmed the essence of *Roe* by holding that a woman's right to an abortion is fundamental,[61] the adoption of the undue-burden standard for reviewing facial challenges sparked the most significant disagreement among the Justices as to the question of *Casey*'s future application.[62]

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53. *Rust*, 500 U.S. at 177-78.

54. *Id.* at 183.

55. *Id.*

56. *Id.* at 203.

57. *Id.*

58. 505 U.S. 833 (1992); *see infra* note 65 (providing a list of cases in which "undue burden" language has appeared).

59. *Casey*, 505 U.S. at 844; *see* PA. CONS. STAT. ANN. §§ 3203-3220 (1990). The debated provisions included an informed-consent requirement, a parental-consent requirement for minors, a spousal-notification requirement, a medical-emergency definition, and a reporting and record-keeping requirement. PA. CONS. STAT. ANN. §§ 3205-3206; *Casey*, 505 U.S. at 844.

60. *Id.* at 875-76 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

61. *Id.* at 845-46 (choosing to follow *Roe*'s three-part holding); Roe v. Wade, 410 U.S. 113, 155 (1973).

62. *See, e.g.*, *Casey*, 505 U.S. at 985 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that "to come across this phrase in the joint opinion—which

According to Justices O'Connor, Kennedy, and Souter, "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[63] The joint opinion asserted that the undue-burden standard was "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty."[64] In addition, following their initial use of the undue-burden language, the three Justices cited a variety of Supreme Court opinions involving abortion, suggesting that *Casey*'s roots were well-grounded in the Court's abortion jurisprudence.[65] Even more explicitly, the joint opinion claimed that the Court's early abortion cases had adhered to the undue-burden approach.[66]

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calls upon federal district judges to apply an 'undue burden' standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear"); *id.* at 965 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (identifying the undue-burden standard as a "standard which is not built to last"). Justice O'Connor's failure to even mention the *Salerno* standard has also added to the confusion over whether the undue-burden standard was meant to replace it.

63. *Id.* at 877 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

64. *Id.* at 876 (noting *Roe*'s discussion of the relationship between a woman's liberty and the state's legitimate interest).

65. *Id.* at 874. The joint opinion cited *Hodgson v. Minnesota*, 497 U.S. 417, 459 (1990) (O'Connor, J., concurring in part and concurring in the judgment in part) (explaining that it had been her understanding that "'if the particular regulation does not "unduly burden" the fundamental right,'" then the Court's evaluation is limited to a rational-basis analysis (quoting Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting))); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519-20 (1990) ("The Ohio statute, in sum, does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion."); *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("It is clear to me that . . . [the provision] does not impose an undue burden on a woman's abortion decision. On this ground alone I would reject the suggestion that [the provision] as interpreted is unconstitutional."); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) ("Under the Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes . . . with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision."); *Akron*, 462 U.S. at 463 (O'Connor, J., dissenting) (noting that the "unduly burdensome" standard is particularly appropriate in the abortion context because of the nature and scope of the right that is involved); *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in the judgment in part and dissenting in part) (arguing that a certain provision within Missouri's abortion statute was constitutional because it imposed no undue burden on the limited right to undergo an abortion); *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) (O'Connor, J., concurring in part and concurring in the judgment) ("I believe that the requirement in this case is not an undue burden on the decision to undergo an abortion.").

66. *Casey*, 505 U.S. at 874; *see, e.g.*, Maher v. Roe, 432 U.S. 464, 473-74 (1977) (explaining that "*Roe* did not declare an unqualified 'constitutional right to an abortion,'" but rather that "the right protects the woman from unduly burdensome interference with her

The joint opinion in *Casey* then clarified the procedure for applying the undue-burden standard and set forth some guiding principles.[67] Primarily, the three Justices explained that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."[68] Following the announcement of the new standard, the Court in *Casey* upheld all of the challenged provisions of the Pennsylvania abortion statute, with the exception of a spousal notification requirement.[69] The Court found that the spousal notification provision was an undue burden because "in a large fraction of the cases in which [the provision] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion."[70]

Chief Justice Rehnquist and Justice Scalia offered harsh criticism for the joint opinion's adoption of a new standard.[71] Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, pointed out the flaws in applying an undue-burden standard,[72] and found it to be "inherently manipulable" and "hopelessly unworkable in practice."[73] In addition to disagreeing with the appropriate standard to apply, Chief Justice Rehnquist concluded that all of the contested provisions of the Pennsylvania statute should be upheld as constitutional.[74] The strong dissent in *Casey* foreshadowed the difficulty that future courts would have in deciding which standard to apply in the context of facial challenges to abortion regulations.

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freedom to decide whether to terminate her pregnancy"); Bellotti v. Baird, 428 U.S. 132, 147 (1976) (asserting that a state may not "impose undue burdens upon a minor capable of giving an informed consent").

67. *Casey*, 505 U.S. at 876-77 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

68. *Id.* at 877.

69. *Casey*, 505 U.S. at 900.

70. *Id.* at 895. More specifically, the Court suggested that women who did not wish to notify their spouses were the target of the provision and the ones most likely to be adversely affected. *Id.* at 894-95.

71. *See id.* at 944-79 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 979-1002 (Scalia, J., concurring in the judgment in part and dissenting in part). The Chief Justice asserted that the undue-burden standard was "created largely out of whole cloth by the authors of the joint opinion," and that it is a "standard which is not built to last." *Id.* at 964-65 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice Scalia similarly attacked the joint opinion's standard by suggesting that "the ultimately standardless nature of the 'undue burden' inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis." *Id.* at 987 (Scalia, J., concurring in the judgment in part and dissenting in part)).

72. *Id.* at 979-1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

73. *Id.* at 986.

74. *Id.* at 979 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

c. The Supreme Court's Reluctance to Definitively Resolve the Issue.—Despite its awareness of the confusion caused by the *Casey/Salerno* debate, the Supreme Court has demonstrated an unwillingness, on at least three occasions, to resolve the confusion over the applicable standard in reviewing facial challenges to state abortion regulations. First, in *Ada v. Guam Society of Obstetricians & Gynecologists*,[75] the Supreme Court denied certiorari in a case in which the Ninth Circuit had held that Guam's law proscribing all abortions except in cases of medical emergency was unconstitutional on its face.[76] Justice Scalia, joined by Chief Justice Rehnquist and Justice White, dissented, asserting that the Ninth Circuit's decision was inherently wrong "since there are apparently some applications of the statute that are perfectly constitutional."[77] The dissent's use of the *Salerno* language reflected these particular Justices' belief that "[t]he Court [in *Casey*] did not purport to change this well-established rule."[78]

Similarly, in *Fargo Women's Health Organization v. Schafer*,[79] the Supreme Court denied an application for stay and injunction pending appeal from the Eighth Circuit's decision related to certain challenged provisions of the North Dakota Abortion Control Act.[80] Despite the fact that both lower courts had applied the *Salerno* "no set of circumstances" test in reviewing the North Dakota provisions,[81] seven of the nine Justices agreed that the applicants had not demonstrated that this was an appropriate occasion for granting a stay pending appeal.[82] However, Justice O'Connor, joined by Justice Souter, wrote a concurring opinion "to point out that [the Court's] denial of relief should not be viewed as signaling agreement with the lower courts' reasoning."[83] In fact, Justice O'Connor further asserted her belief that the lower courts' approach was inconsistent with *Casey*, claiming

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75. 506 U.S. 1011 (1992).

76. *Id.* at 1011; *see* Guam Soc'y of Obstetricians & Gynecologists v. Ada, 902 F.2d 1366, 1374 (9th Cir. 1992).

77. *Ada*, 506 U.S. at 1011 (Scalia, J., dissenting).

78. *Id.* at 1013.

79. 507 U.S. 1013 (1993).

80. *Id.* at 1013; *see* N.D. CENT. CODE §§ 14-02.1-01 to -12 (1991).

81. Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 530 (8th Cir. 1994); Fargo Women's Health Org. v. Sinner, 819 F. Supp. 862, 864 (D.N.D. 1993).

82. *Schafer*, 507 U.S. at 1013. Justices Blackmun and Stevens would have granted the application. *Id.* Following the *Schafer* decision, the Eighth Circuit demonstrated its acceptance of the *Casey* standard. *See* Planned Parenthood v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995) (holding that the *Casey* Court "effectively overruled *Salerno* for facial challenges to abortion statutes").

83. *Schafer*, 507 U.S. at 1014 (O'Connor, J., concurring).

that a proper analysis would have reflected the undue-burden standard.[84]

Finally, in *Janklow v. Planned Parenthood*,[85] a divided Supreme Court denied certiorari in another case from the Eighth Circuit, in which the court declared unconstitutional a South Dakota law that required a physician to notify a pregnant minor's parent of an impending abortion hours before the abortion was to be performed.[86] Concurring with the majority, Justice Stevens wrote separately to express his view that "there is no need for this Court affirmatively to disavow that unfortunate language [in *Salerno*], in the abortion context or otherwise, until it is clear that a federal court has ignored the appropriate principle and applied the draconian 'no circumstance' dictum to deny relief."[87] In his dissent, Justice Scalia argued that the very reasoning employed by Justice Stevens to support the denial of certiorari provided even stronger justification for the Court's acceptance of the opportunity to clarify the applicable standard for reviewing facial challenges.[88] Recognizing that the Court's lack of clarity had led to inconsistent results among the circuits, Justice Scalia expressed concern that "the courts of appeals will be induced to abandon [*Salerno*] by reading the tea leaves of concurring opinions."[89]

In *Stenberg v. Carhart*,[90] the most recent decision involving a facial challenge to a state abortion statute, the Court granted certiorari to review the Eighth Circuit's finding that a Nebraska statute that criminalized the performance of "partial birth abortions" was unconstitutional.[91] The majority upheld the lower court's finding, applying the principles set forth in *Casey* and concluding that the Nebraska statute violated the Constitution for at least two independent reasons.[92]

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84. *Id.*

85. 517 U.S. 1174 (1996).

86. *Id.* at 1176. The Eighth Circuit declared the statute unconstitutional, reasoning that "a large fraction of minors seeking pre-viability abortions would be unduly burdened by the statute." *Miller*, 63 F.3d at 1463.

87. *Janklow*, 517 U.S. at 1175-76 (Stevens, J., concurring). Justice Stevens may have purposely ignored the Fifth Circuit's decision in *Barnes v. Moore*, 970 F.2d 12 (5th Cir. 1992), which upheld a Mississippi provision using the *Salerno* standard, because subsequent Fifth Circuit decisions have reflected that circuit's reluctance to resolve the question without a clear message from the Supreme Court. *See infra* notes 103-110 and accompanying text (describing the Fifth Circuit's inconsistent treatment of the *Casey/Salerno* debate).

88. *Janklow*, 517 U.S. at 1180 (Scalia, J., dissenting) (stating that "if *Salerno* is a dead letter *even outside of the abortion context* [as Justice Stevens suggested], all the more reason to grant certiorari and make that clear").

89. *Id.* at 1181.

90. 530 U.S. 914 (2000).

91. *Id.* at 922; *see* NEB. REV. STAT. ANN. § 28-328 (Michie Supp. 1999).

92. *Stenberg*, 530 U.S. at 930-31.

The first basis for the statute's invalidation was its failure to include an exception for the preservation of the health of the mother[93]—a mandate initially adopted in *Roe*, and reaffirmed by the Court in *Casey*.[94] The Court then applied *Casey*'s undue-burden standard and found that the statute imposed an undue burden on a woman's ability to choose a dilation and evacuation (D&E) abortion, "thereby unduly burdening the right to choose abortion itself."[95]

Stenberg included various dissents[96] that disagreed with everything from the Court's initial entrance into abortion jurisprudence vis-à-vis *Roe*,[97] to its more recent standard for evaluating facial challenges as set forth in *Casey*.[98] The common theme of the dissenting opinions centered around the Justices' rejection of the undue-burden standard as an appropriate tool for reviewing abortion regulations.[99] However, three of the dissenters additionally contended that the majority incor-

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93. *Id.* at 930.

94. Roe v. Wade, 410 U.S. 113, 163-64 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 872 (1992).

95. *Stenberg*, 530 U.S. at 930. The majority reasoned that "[a]ll those who perform abortion procedures using [the D&E] method must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision. We must consequently find the statute unconstitutional." *Id.* at 945-46.

96. Chief Justice Rehnquist and Justice Scalia wrote separate dissents. *See id.* at 952 (Rehnquist, C.J., dissenting); *id.* at 953-56 (Scalia, J., dissenting). Justice Kennedy wrote a dissent that the Chief Justice joined. *Id.* at 956-79 (Kennedy, J., dissenting). Justice Thomas wrote a dissent that was joined by Chief Justice Rehnquist and Justice Scalia. *Id.* at 980-1020 (Thomas, J., dissenting).

97. *See, e.g., id.* at 956 (Scalia, J., dissenting) (quoting his dissent in *Casey* where he expressed his disagreement with the Supreme Court's involvement in the "abortion-umpiring business"); *id.* at 980 (Thomas, J., dissenting) (calling the Court's decision in *Roe* "grievously wrong" and criticizing the Court's extension of *Roe*'s principles).

98. The strong language used by the dissenting Justices to express their disagreement with *Casey*'s undue-burden standard further supports the notion that *Casey* has replaced *Salerno* as the applicable standard for reviewing facial challenges to abortion regulations. For example, Chief Justice Rehnquist stated:

> I did not join in the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), and continue to believe that case is wrongly decided. Despite my disagreement with the opinion, under the rule laid down in *Marks v. United States*, 430 U.S. 188 (1977), the *Casey* joint opinion represents the holding of the Court in that case.

Id. at 952 (Rehnquist, C.J., dissenting). In *Marks*, the Court explained that when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding is the position taken by those justices who concurred in judgment on the narrowest grounds. *Marks*, 430 U.S. at 193 (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). Justice Scalia also commented that the undue-burden test made law by the *Casey* joint opinion must be overruled because it is hopelessly unworkable and simply allows each Justice to make a policy decision. *Stenberg*, 530 U.S. at 954-56 (Scalia, J., dissenting).

99. *See supra* note 98.

rectly had applied the standard to arrive at what they considered to be an extraordinary result.[100]

d. Debate Among the Circuits: Casey *or* Salerno?—The *Casey* joint opinion left unresolved whether it overruled *Salerno* in the context of abortion challenges.[101] However, an overwhelming majority of federal circuits responded to *Casey* by accepting its undue-burden standard as the applicable test in reviewing facial challenges to abortion regulations.[102]

The Fifth Circuit, in *Barnes v. Moore*,[103] was the first to address the issue following the Court's decision in *Casey* and is the only circuit, other than the Fourth Circuit, that continues to adhere to the *Salerno* standard.[104] In upholding the Mississippi abortion statute's informed consent and twenty-four-hour waiting period provisions,[105] the Fifth Circuit reaffirmed the applicability of the *Salerno* test.[106] Recognizing that the *Casey* joint opinion had applied a somewhat different standard, the *Barnes* court refused to "interpret *Casey* as having overruled,

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100. *See, e.g., Stenberg*, 530 U.S. at 1020 (Thomas, J., dissenting) (claiming that the majority's holding means "that 30 states are prohibited from banning one rarely used form of abortion that they believe to border on infanticide").

101. *See* Burdick, *supra* note 42, at 869 (suggesting that the root of the problem lies in the fact that the *Casey* joint opinion failed to expressly overrule *Salerno*, and that this threshold issue has also precluded many courts from ever reaching an undue-burden analysis).

102. *See, e.g.*, Karlin v. Foust, 188 F.3d 446, 480 (7th Cir. 1999); Planned Parenthood v. Lawall, No. 98-15862, 1999 U.S. App. LEXIS 33154, at *11 (9th Cir. June 9, 1999); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 197 (6th Cir. 1997); Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996); Planned Parenthood v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995); Casey v. Planned Parenthood, 14 F.3d 848, 857 (3d Cir. 1994).

103. 970 F.2d 12 (5th Cir. 1992) (per curiam).

104. *See id.* at 14 (applying *Salerno*'s "no set of circumstances" test to the plaintiffs' facial challenge).

105. MISS. CODE ANN. § 41-41-83 (1999).

106. *See Barnes*, 970 F.2d at 14 (concluding that "[b]ecause the plaintiffs are challenging the facial validity of the Mississippi Act, they must 'establish that no set of circumstances exists under which the Act would be valid'" (quoting United States v. Salerno, 481 U.S. 739, 745 (1987))). The provisions were "substantially identical" to those upheld by the Court in *Casey*. *Id.* at 13. In their supplemental briefs, the plaintiffs had attempted to distinguish the Mississippi abortion provisions from the ones upheld in *Casey*, principally arguing that, under *Casey*, the case should be remanded for evidentiary proceedings so that they might prove that the Mississippi statute posed an undue burden on women seeking abortions. *Id.* at 15 n.5.

The court rejected the plaintiffs' argument, finding that the *Casey* joint opinion only set forth a standard of general application. *Id.* at 15. The court then concluded that the differences between the Mississippi and Pennsylvania Acts were not sufficient to render the former unconstitutional on its face, thus rejecting the plaintiffs' argument that "Mississippi ain't Pennsylvania." *Id.* at 15 & n.5; *see also* Burdick, *supra* note 42, at 847 (discussing the improper application of *Casey* by courts in comparing the language of the provisions, rather than conducting an actual undue-burden inquiry).

sub silentio, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes."[107]

Although employing the *Salerno* test in *Barnes*, the Fifth Circuit's subsequent application of *Casey* and *Salerno* has been inconsistent.[108] While the first decision following *Barnes* agreed that *Casey* had overruled *Salerno*,[109] two more recent Fifth Circuit decisions chose not to question *Barnes*'s adherence to *Salerno*, because the outcome of the cases did not depend on the standard applied.[110]

Following the Supreme Court's decision, *Casey* was remanded to the Third Circuit to consider the issue of severability.[111] Interpreting the Supreme Court's decision as a clear mandate, the Third Circuit panel implemented the Court's judgment regarding the challenged provisions of the Pennsylvania abortion statute.[112] The Third Circuit found that the language of the Supreme Court's opinion in *Casey* made it clear that the Court had applied the new undue-burden standard and had decided the case on the merits.[113] Therefore, the Third Circuit remanded the case to the district court with instructions to enter a final judgment.[114] In doing so, the court recognized that the Supreme Court "set a new standard for facial challenges to pre-viability abortion laws," thus rejecting the old *Salerno* rule.[115]

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107. *Barnes*, 970 F.2d at 14 n.2.

108. *Compare id.* (choosing to apply the *Salerno* "no set of circumstances" standard), *with* Soujourner T. v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992) (expressing the view that *Casey* had overruled *Salerno*).

109. *Sojourner T.*, 974 F.2d at 31 (holding that, under *Casey*, a Louisiana statute was unconstitutional on its face because it imposes an undue burden on women seeking an abortion before viability).

110. Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1104 (5th Cir. 1997) (declining the opportunity to overrule *Barnes*'s adherence to *Salerno* because the statute was unconstitutional whether viewed under *Casey* or *Salerno*); Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999) (same).

111. Casey v. Planned Parenthood, 14 F.3d 848, 852 (3d Cir. 1994). The history of the *Casey* decision is long and confusing, given the lower courts' confusion over the Supreme Court's use of a new standard. *See* Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992), *on remand*, 978 F.2d 74 (3d Cir.), *on remand*, 822 F. Supp. 227 (E.D. Pa. 1993), *rev'd*, 14 F.3d 848 (3d Cir. 1994).

112. *Casey*, 14 F.3d at 852 (understanding the Supreme Court's *Casey* decision as having resolved all questions in the case, except for severability).

113. *Id.* at 857.

114. *Id.* at 863.

115. *Id.* at 863 n.21. More recently, the Third Circuit, in *Planned Parenthood v. Farmer*, 220 F.3d 127 (3d Cir. 2000), affirmed its earlier adoption of the *Casey* standard, concluding that "the *Casey* Court muted the *Salerno* requirement in the abortion context," and finding the New Jersey partial-birth abortion ban in question unconstitutional under the undue-burden standard. *Id.* at 142.

In *Planned Parenthood v. Miller*,[116] the Eighth Circuit considered the constitutionality of various provisions of South Dakota's abortion statute, specifically the parental-notice provision, the criminal and civil penalty provisions, and the mandatory-information provision.[117] However, before the court addressed the merits of the case, it first had to resolve the issue of the applicable standard in challenging the facial constitutionality of an abortion law.[118] The Court acknowledged the split between the Fifth and the Third Circuits, as well as the disagreement among the Justices of the Supreme Court.[119] The court ultimately applied *Casey*'s undue-burden test, deciding to "follow what the Supreme Court did—rather than what it failed to say,"[120] which resulted in the invalidation of both the parental-notice[121] and criminal and civil penalty provisions[122] of South Dakota's statute.[123]

In *Jane L. v. Bangerter*,[124] the Tenth Circuit, in accord with the Eighth Circuit, held that "the proper test after *Casey* is the 'undue burden' standard applied by the Court in that case."[125] The court concluded that a Utah abortion provision restricting the availability of abortion after twenty weeks was unconstitutional because it "was enacted with the specific purpose of placing an insurmountable obstacle in the path" of the group of women seeking abortions.[126] Similarly, the Sixth Circuit, in *Women's Medical Professional Corp. v. Voinovich*,[127] declared that two provisions of Ohio's abortion statute were unconstitutional because they "placed a substantial obstacle in the path of women seeking pre-viability abortions."[128] The *Voinovich* court followed the majority of courts that had held that *Casey* displaced *Salerno* in the

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116. 63 F.3d 1452 (8th Cir. 1995).

117. *Id.* at 1454.

118. *Id.* at 1456.

119. *Id.* at 1457.

120. *Id.* at 1458 (holding that the *Casey* Court "effectively overruled *Salerno* for facial challenges to abortion statutes").

121. *Id.* at 1459-60.

122. *Id.* at 1465.

123. *Id.* at 1468. Critics have both praised and criticized the court's undue-burden analysis in *Miller*. *See, e.g.*, Burdick, *supra* note 42, at 858 (claiming that the court "properly depended upon findings of fact with regard to the civil and criminal penalty provisions, but improperly decided constitutionality by comparing the South Dakota informed consent provision to similar provisions in other states"). In a more recent Eighth Circuit decision, *Little Rock Family Planning Services v. Jegley*, 192 F.3d 794 (8th Cir. 1999), the court invalidated Arkansas's partial-birth abortion act, and applied *Casey*'s undue-burden test instead, which had previously been applied by the Eighth Circuit in *Miller*, 63 F.3d at 1458.

124. 102 F.3d 1112 (10th Cir. 1996).

125. *Id.* at 1116.

126. *Id.* at 1117.

127. 130 F.3d 187 (6th Cir. 1997).

128. *Id.* at 203.

abortion context, extending the decision further by suggesting that *Casey*'s analysis should be applied to post-viability abortion regulations as well.[129] More recently, in *Planned Parenthood v. Lawall*,[130] the Ninth Circuit applied *Casey*'s undue-burden standard, relying on the great weight of authority indicating that *Casey* overruled *Salerno* in the context of facial challenges to abortion statutes.[131]

The Seventh Circuit also joined the courts that have chosen to follow *Casey* in its recent decision in *Karlin v. Foust*.[132] In *Karlin*, several physicians and organizations, which operated facilities that provided abortion services, challenged a Wisconsin bill that would add a twenty-four-hour waiting period to the state's informed-consent statute.[133] The court's extensive discussion of the legal framework governing abortion regulations demonstrated its view that the *Casey* joint opinion represents the holding of the Supreme Court.[134] Recognizing that the *Casey* Court had adopted a new standard that was incompatible with *Salerno*'s more stringent "no set of circumstances," the court suggested that it was bound to apply the undue-burden test in the context of a facial challenge.[135] In its attempt to follow *Casey*'s undue-burden analysis, the court pointed out the inherent difficulties in determining "what exactly is meant by an 'undue' burden"[136] and focused its inquiry on both the effects and the purpose of the Wisconsin statute.[137] The court concluded that the law did not impose an

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129. *See id.* at 196-97.

130. No. 98-15862, 1999 U.S. App. LEXIS 33154 (9th Cir. June 9, 1999).

131. *Id.* at *11. The *Lawall* court also cited *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc) (suggesting that *Salerno* does not apply in reviewing abortion regulations), as further support for its conclusion. *Lawall*, 1999 U.S. App. LEXIS 33154, at *11.

132. 188 F.3d 446 (7th Cir. 1999).

133. *Id.* at 453.

134. *Id.* at 478 n.14 (suggesting that even though only three Justices joined the lead opinion in *Casey*, according to *Marks v. United States*, 430 U.S. 188, 193 (1977), the opinion constitutes the Court's holding).

135. *Id.* at 480. However, a short paragraph in the decision suggests that the court was hesitant to demonstrate complete acceptance of the *Casey* standard. *See id.* at 483. First, the court noted that the district court had applied *Casey* and that neither party had appealed the court's use of that standard. *Id.* The court then created doubt in its acceptance of *Casey* by explaining that the Seventh Circuit had "not yet had occasion to pass on the proper standard for reviewing facial challenges to an abortion statute in light of *Casey*; however, . . . [f]or purposes of this appeal, we will assume that the standard set forth in *Casey* applies." *Id.* The court then asserted that even if it had chosen to apply the *Salerno* standard, the outcome would have been the same. *Id.*

136. *Id.* at 480.

137. *Id.* at 483-97.

undue burden on a woman's abortion choice and upheld it as constitutional.[138]

e. Fourth Circuit Precedent: An Example of the Confusion.—The Fourth Circuit, in a similar manner to that of the Fifth Circuit, has also struggled to determine the applicable standard for facial challenges to abortion regulations following the Supreme Court's decision in *Casey*. In 1997, in *Manning v. Hunt*,[139] the court reviewed a district court's denial of a preliminary injunction in a case challenging the constitutionality of a North Carolina provision that required parental or judicial consent for an unemancipated minor's abortion.[140] Despite a discussion of the debate within the circuits as to the appropriate standard and an ultimate rejection of the *Casey* undue-burden standard as controlling precedent,[141] the court found that because the plaintiffs had not challenged the district court's application of the *Salerno* standard, the issue was not properly before it.[142] The court noted in passing, however, that the reasoning of the Fifth Circuit in *Barnes* appeared most persuasive and agreed with the *Barnes* court that, until the Supreme Court specifically overrules *Salerno*, lower courts are bound to apply it.[143] In its reasoning, the *Manning* court relied heavily on *Bellotti v. Baird*,[144] a Supreme Court decision focusing on the issue of abortion for unemancipated minors, similar to the issue raised in *Manning*.[145] Ultimately, the court affirmed the district court's opinion, explaining that "on their face, [the provisions] comply with *Bellotti* and are not an undue burden on a minor's right to an

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138. *Id.* at 488 (explaining that the "plaintiffs failed to show that Wisconsin's waiting period [was] likely to impose an undue burden on Wisconsin women").

139. 119 F.3d 254 (4th Cir. 1997).

140. *Id.* at 257; N.C. GEN. STAT. §§ 90-21.6 to .10 (1999).

141. *See Manning*, 119 F.3d at 267-69. The court seemed to inaccurately combine the language of *Salerno* and *Casey*. It concluded that "in order to succeed, Appellants are required to show that *under no set of circumstances* can the Act be applied in a manner which is not an *undue burden* on an unemancipated minor's right to obtain an abortion." *Id.* at 269 (emphasis added).

142. *Id.* at 268 n.4.

143. *Id.*

144. 443 U.S. 622 (1979).

145. *Manning*, 119 F.3d. at 269 (stating that the court's primary focus is on the standards set forth by the Supreme Court in *Bellotti v. Baird*, 443 U.S. 622, 643 (1979), which held that if a state requires a pregnant minor to obtain parental consent to an abortion, it must also provide an alternative procedure). The *Manning* court explained that "the Supreme Court first addressed the requirements of a valid judicial bypass in *Bellotti*," involving the issue of abortion for unemancipated minors. *Id.* at 262.

abortion."[146] As a result, the appellants' motion for a preliminary injunction against the North Carolina provision was denied.[147]

A year after *Manning*, the Fourth Circuit had another opportunity to consider whether *Casey* had displaced *Salerno* as the appropriate standard for reviewing facial challenges to abortion statutes. In *Planned Parenthood v. Camblos*,[148] the Fourth Circuit, sitting en banc, upheld as constitutional a Virginia parental-notice provision.[149] Like the court in *Manning*, the majority in *Camblos* failed to resolve the *Salerno/Casey* debate, concluding that the challenge to the statute would fail regardless of the standard applied by the court.[150] While the *Camblos* majority acknowledged that the *Manning* court had suggested that *Salerno* was the governing standard, the court neither accepted nor rejected the *Manning* approach.[151] However, in his concurring opinion, Judge Michael, joined by Judges Murnaghan, Ervin, and Motz, looked past the majority's doubts as to whether *Casey* had overruled *Salerno* and asserted that *Casey* clearly had "'set forth a standard of general applicability' for reviewing facial challenges to abortion restrictions."[152]

Prior to the Fourth Circuit's decision in *Camblos*, in *Richmond Medical Center for Women v. Gilmore*,[153] the United States District Court for the Eastern District of Virginia granted preliminary injunctive relief to a group of plaintiffs challenging the constitutionality of certain portions of Virginia's abortion statute pertaining to partial-birth abortions.[154] In its opinion, the court decided to follow the rule applied by the Supreme Court in *Casey*, noting that it was not bound by the *Manning* dicta.[155] After the Fourth Circuit stayed the district court's preliminary injunction,[156] the district court granted the plaintiffs de-

146. *Id.* at 272.

147. *Id.* at 276.

148. 155 F.3d 352 (4th Cir. 1998) (en banc).

149. *Id.* at 355.

150. *Id.* at 359 n.1.

151. *See id.* at 381 n.14.

152. *Id.* at 389 n.2 (Michael, J., concurring) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992)).

153. 11 F. Supp. 2d 795 (E.D. Va. 1998).

154. *Id.* at 799; *see* VA. CODE ANN. § 18.2-74.2 (Michie 1997) (repealed 1998). The plaintiffs were Virginia physicians, medical clinics, and nonprofit corporations offering reproductive health services and obstetrical and gynecological medical services, including abortions. *Gilmore*, 11 F. Supp. 2d at 799.

155. *Gilmore*, 11 F. Supp. 2d at 819-21. The court found the reasoning offered by the Sixth, Eighth, and Tenth Circuits persuasive and declared that because the parties in *Manning* had not requested that the Fourth Circuit decide the issue, the *Manning* court's dicta was not binding on them. *Id.* at 819 n.27, 821.

156. Richmond Med. Ctr. for Women v. Gilmore, 144 F.3d 326 (4th Cir. 1998).

claratory and injunctive relief, holding that the Partial Birth Abortion Act was unconstitutional because it imposed an undue burden on the fundamental right to choose an abortion, contained no health exception or an adequate life exception for the mother, and was impermissibly void for vagueness.[157] The district court's use of the *Casey* language reflected its view that *Casey* had replaced *Salerno* in actions contesting the facial validity of abortion statutes.[158] Its decision was based on its express rejection of the *Manning* dicta, after it acknowledged that, unlike the court in *Camblos*, the question of the applicable standard had real pertinence in the present action.[159] On appeal, and following the Supreme Court's decision in *Stenberg*, the Fourth Circuit affirmed the district court's decision, but narrowed its reasoning for invalidating the statute to include only its absence of an adequate health exception.[160]

Despite the fact that various courts, including the Supreme Court and at least five circuits, have addressed the issue of the appropriate standard for facial challenges to abortion regulations, the Fourth Circuit's analysis in *Greenville* reflects the confusion over the applicable standard and how the standard should be applied.

3. The Court's Reasoning.—In *Greenville Women's Clinic v. Bryant*, the Fourth Circuit upheld South Carolina Regulation 61-12, which provided detailed requirements for the licensing of abortion clinics, despite the district court's ruling that the regulation violated the plaintiffs' due process and equal protection rights as guaranteed by the Fourteenth Amendment.[161] The majority began its due process analysis by explaining that the plaintiffs faced a heavy burden in mounting a facial challenge to the constitutionality of a state regula-

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157. Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 500 (E.D. Va. 1999).

158. *Id.* at 476-79.

159. *Id.*

160. Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337, 339 (4th Cir. 2000) (per curiam). The Fourth Circuit seemed reluctant to express its adoption of the undue-burden standard, choosing instead to follow the Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), where the Court invalidated a similar statute because of the absence of a health exception for the mother. *Id.* at 338-39; *see Stenberg*, 530 U.S. at 921-22.

161. *Greenville*, 222 F.3d at 159. The majority opinion was written by Circuit Judge Niemeyer, who was joined by Judge Frederic N. Smalkin, United States District Judge for the District of Maryland, sitting by designation. *Id.*; *see supra* note 2 and accompanying text (describing the history and scope of Regulation 61-12). Although the court upheld the regulation on both due process and equal protection grounds, only its due process analysis is discussed in this Note.

tion.[162] The court reiterated the standard for facial challenges established in *Salerno*, emphasizing that "'[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists* under which the Act would be valid.'"[163]

After endorsing *Salerno* as the appropriate standard, the court acknowledged the debate among the circuits as to whether *Casey*'s undue-burden standard had replaced *Salerno*'s "no set of circumstances" test.[164] Despite the court's recognition that the Third,[165] Sixth,[166] Eighth,[167] Ninth,[168] and Tenth[169] Circuits have demonstrated acceptance of the *Casey* undue-burden standard, the majority explained that Fourth Circuit precedent required that it continue to apply the *Salerno* standard until the Supreme Court specifically overrules it in the abor-

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162. *Greenville*, 222 F.3d at 163. The majority explained that because of the nature of facial challenges, the plaintiffs could not present the district court with a particular case or controversy for which the regulation could be tested. *Id.* at 163-64. Instead, they had to focus only on arbitrarily selected hypotheticals to which the regulation might apply, requiring the court to speculate about its overall effect. *Id.* at 164. The Supreme Court has demonstrated its reluctance to strike down statutes and regulations based only on the anticipation of particular circumstances. *See id.* at 164 (noting that "'[i]t has not been the Court's practice' to strike down a statute on a facial challenge 'in anticipation' of particular circumstances, even if the circumstances would amount to a likelihood" (quoting Bowen v. Kendrick, 487 U.S. 589, 612-13 (1988))).

163. *Id.* at 164 (emphasis added) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). The *Greenville* court provided further support for the *Salerno* "no set of circumstances" standard by citing *Rust v. Sullivan*, 500 U.S. 173, 177-78 (1991), which upheld a federal regulation that restricted the ability of the Secretary of Health and Human Services to enter into contracts with public or nonprofit private entities that assist in family planning projects as long as they advocate abortion as a method of family planning. *Greenville*, 222 F.3d at 164.

164. *Greenville*, 222 F.3d at 164.

165. *See* Casey v. Planned Parenthood, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (noting that the Supreme Court in *Casey* "set a new standard for facial challenges to pre-viability abortion laws").

166. *See* Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 193-96 (6th Cir. 1997) (concluding that *Salerno* is inapplicable to facial challenges to abortion regulations and applying *Casey*'s undue-burden standard).

167. *See* Planned Parenthood v. Miller, 63 F.3d 1452, 1458 (8th Cir. 1995) (choosing to follow "what the Supreme Court actually did—rather than what it failed to say—and apply the undue-burden test" to facial abortion challenges).

168. *See* Planned Parenthood v. Lawall, No. 98-15862, 1999 U.S. App. LEXIS 33154, at *11 (9th Cir. 1999) ("In light of our previous suggestion, combined with the great weight of authority holding that *Casey* has overruled *Salerno* in the context of facial challenges to abortion statutes, we apply *Casey*'s undue burden standard in determining the facial constitutionality of the statute at issue.").

169. *See* Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996) (noting the difference between *Casey* and *Salerno* and applying *Casey*'s undue-burden standard to facial abortion challenges).

tion-regulation context.[170] In addition to basing its reasoning on notions of *stare decisis*,[171] the majority added that "the logic of the *Salerno* test is necessary to show deference to legislatures, particularly in light of the limitation imposed by Article III of the Constitution that the judiciary act only in cases and controversies."[172] Following its conclusion that the *Salerno* "no set of circumstances" standard should be applied, the majority reasoned that the plaintiffs' facial challenge must fail "because the impact on the Greenville Women's Clinic would be so modest."[173]

Rather than ending its due process inquiry there, the majority continued to analyze the plaintiffs' challenge under the "less deferential" undue-burden standard, lending support to its conclusion that Regulation 61-12 should be upheld as constitutional.[174] Relying on language from *Casey*, the majority asserted that the record provided no evidence from which to conclude that the regulation would present a substantial obstacle to a large fraction of women in South Carolina who might seek an abortion at a clinic subject to Regulation 61-12.[175] The court rejected the plaintiffs' argument that the regulation would place an undue burden on women seeking abortions in South Carolina because of the estimated price increase associated with each clinic's full compliance.[176] The majority pointed to the lack of evidence of the Regulation's impact on other South Carolina abortion clinics and the fact that it was forced to speculate about the impact on all relevant women—an analysis that the record simply did not per-

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170. *Greenville*, 222 F.3d at 164-65. The court's reasoning purported to follow precedent set forth in *Manning v. Hunt*, 119 F.3d 254 (4th Cir. 1997), in which a Fourth Circuit panel observed that "this Court is bound to apply the *Salerno* standard as it has been repeatedly applied in the context of other abortion regulations reviewed by the Supreme Court . . . and in the context of challenges to legislative acts based on other constitutional grounds." *Greenville*, 222 F.3d at 164-65 (quoting *Manning*, 119 F.3d at 268 n.4). Although alluding to the fact that the *Manning* language it relied on is considered by some courts to be dicta, the *Greenville* majority expressed its view that adherence to *Salerno* was in fact necessary to the *Manning* court's ruling. *Id.* at 165.

171. *Greenville*, 222 F.3d at 165.

172. *Id.*; *see also* U.S. CONST. art. III, § 2.

173. *Greenville*, 222 F.3d at 165 (concluding that the increased cost and potential closing of one of the plaintiff's abortion clinics did not constitute a substantial obstacle).

174. *See id.* at 165-72.

175. *Id.* at 165. The majority's conclusion rested on its assertion that of the three abortion providers who brought suit, only one (Dr. Lynn, who would likely be forced to cease providing abortions at his Beaufort facility) "would be adversely affected in any significant way in providing abortion services." *Id.* The majority then pointed to the fact that women in Beaufort would still be left with the option to go to the clinic in Charleston, nearly 70 miles away. *Id.*

176. *Id.*

mit.[177] Satisfied that the plaintiffs could not meet either *Salerno* or *Casey*, the court rested its decision on the Regulation's presumptive constitutionality.[178]

The dissent, written by Senior Circuit Judge Hamilton, focused on the Supreme Court's difficulty since its decision in *Roe v. Wade* in formulating a precise standard for reviewing facial challenges to abortion regulations.[179] First, the dissent acknowledged that, in *Salerno*, the Supreme Court set forth a standard that mandated a facial challenge failure if the statute had any constitutional application.[180] Next, the dissent pointed out that the Supreme Court's subsequent decision in *Casey* held that an abortion law is unconstitutional on its face if, "'in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'"[181] Recognizing that *Casey* did not expressly overrule *Salerno*, the dissent pointed out that the inconsistent language of *Casey* and *Salerno* suggested that *Casey* had displaced *Salerno* in the abortion context.[182] The dissent provided further support for this position by citing to the various circuits that have applied the *Casey* standard, specifically noting that doing so signified their rejection of *Salerno* as precedent.[183]

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177. *Id.*

178. *See id.*

179. *See id.* at 194 (Hamilton, J., dissenting). The dissent discussed how the *Roe* Court's determination that abortion is a fundamental right suggested that "state abortion regulations should be analyzed under the strict scrutiny standard of review," requiring a compelling state interest and a regulation narrowly drawn to further that interest in order to justify the regulation as valid. *Id.*

180. *Id.*

181. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 895 (1992)).

182. *Id.* at 194-95. The dissent's comparison of the language demonstrated that under *Salerno* no factual showing of unconstitutional application can render a law unconstitutional if it has any constitutional application. *Id.* By contrast, under *Casey*, a factual showing of unconstitutional application in a "large fraction of cases" where the law applies can render a law unconstitutional, even if it has some constitutional application. *Id.*

183. *Id.* at 169. The dissent cited *Planned Parenthood v. Lawall*, No. 98-15862, 1999 U.S. App. LEXIS 33154, at *11 (9th Cir. 1999) ("In light of our previous suggestion, combined with the great weight of authority holding that *Casey* has overruled *Salerno* in the context of facial challenges to abortion statutes, we apply *Casey*'s undue-burden standard in determining the facial constitutionality of the statute at issue."); *Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 193-96 (6th Cir. 1997) (concluding that *Salerno* is inapplicable to facial challenges to abortion regulations and applying *Casey*'s undue-burden standard); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1458 (8th Cir. 1995) (choosing to follow "what the Supreme Court actually did—rather than what it failed to say—and apply the undue-burden test" to facial abortion challenges); and *Casey v. Planned Parenthood*, 14 F.3d 848, 863 n.21 (3d Cir. 1994) (noting that the Supreme Court in *Casey* "set a new standard for facial challenges to pre-viability abortion laws"). The dissent also recognized the Fifth Circuit's inconsistent application of *Salerno* and its failure to resolve the inconsistency. *Green-*

Unlike the majority, the dissent argued that the Fourth Circuit had yet to resolve the *Salerno/Casey* debate because the *Manning* court's application of *Salerno* was not challenged by the plaintiffs, and, therefore, the court's suggestion that the *Salerno* standard should be applied until the Supreme Court explicitly overrules it was merely dicta.[184] In addition to the lack of binding Fourth Circuit authority, the dissent reasoned that the Supreme Court's recent application of the *Casey* undue-burden standard in *Stenberg v. Carhart* definitively resolved the question.[185] Believing that the court was bound only by *Stenberg*, the dissent concluded that the current Supreme Court no longer recognizes *Salerno* as the law in the abortion context.[186]

Once Judge Hamilton provided sufficient support for his contention that *Casey* was the appropriate standard, he further clarified the undue-burden standard by noting that "'[a] finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of women seeking an abortion of a nonviable fetus.'"[187] The dissent agreed with the joint opinion in *Casey* that a statute with such a purpose is invalid because the means chosen by the state to further its interest should attempt to inform the woman's free choice, not to hinder it.[188] Unlike the majority, the dissent concluded that a careful review of the record disclosed that Regulation 61-12 does not further South Carolina's interest in protecting maternal health,[189] and in fact, constitutes

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ville, 222 F.3d at 195; *see also supra* notes 103-110 and accompanying text (discussing the confusion within the Fifth Circuit).

184. *Greenville*, 222 F.3d at 195 (Hamilton, J., dissenting). In support of this statement, the dissent cited *Planned Parenthood v. Camblos*, 155 F.3d 352, 389 n.2 (4th Cir. 1998) (Michael, J., concurring), in which the Fourth Circuit acknowledged the *Manning* dicta, but failed to resolve the debate. *Greenville*, 222 F.3d at 195 (Hamilton, J., dissenting).

185. *Greenville*, 222 F.3d at 195-96 (Hamilton, J., dissenting) (referring to *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000), in which the Court held that a Nebraska statute was unconstitutional because it lacked any exception for the preservation of the health of the mother and because it amounted to an undue burden on a woman's right to an abortion).

186. *Id.* at 196.

187. *Id.* at 197 (quoting *Casey*, 505 U.S. at 877).

188. *Id.*; *see Casey*, 505 U.S. at 877 (joint opinion of O'Connor, Kennedy & Souter, JJ.). This reasoning is related to the notion that a statute which imposes an undue burden on a woman's fundamental right to obtain an abortion cannot be considered a permissible means of serving its legitimate ends. *Greenville*, 222 F.3d at 197 (Hamilton, J., dissenting).

189. *Greenville*, 222 F.3d at 197 (Hamilton, J., dissenting). This conclusion was based on the dissent's belief that Regulation 61-12 was riddled with unnecessary requirements not reasonably related to maternal health or which depart from accepted medical practice. *Id.* at 198-99.

an undue burden on the right to have an abortion by causing a significant increase in the cost of obtaining the procedure.[190]

4. Analysis.—In *Greenville Women's Clinic v. Bryant*, the Fourth Circuit faced the difficult task of determining the facial validity of a South Carolina abortion regulation that established detailed requirements for the licensing of abortion clinics.[191] Before it could address the merits of the case, however, the court first had to determine the appropriate standard for reviewing facial challenges to the constitutionality of an abortion statute.[192] The majority's adherence to *Salerno*'s "no set of circumstances" standard reflects a manipulation of Fourth Circuit precedent. By contrast, the dissent's application of *Casey*'s undue-burden standard, based on its conclusion that the Supreme Court's recent decision in *Stenberg* definitively resolved the issue, accurately reflects the Supreme Court's position on the applicable standard for facial challenges to abortion statutes.

Due to the fact that both the majority and dissenting opinions examined Regulation 61-12 using the undue-burden standard,[193] the *Greenville* decision also indicates that lower courts are still unclear as to how to perform *Casey*'s undue-burden inquiry. Because the Supreme Court's lack of guidance in this area has created so much confusion regarding the applicable standard and how it should be applied, *Greenville* illustrates how easily lower courts can continue to manipulate their analyses of facial due process challenges to reach philosophically desired outcomes.

a. The Majority's Misapplication of Fourth Circuit Precedent.—In deciding *Greenville*, the majority implied that the Fourth Circuit previously resolved the *Salerno/Casey* debate in *Manning v. Hunt*, where the court refused to recognize *Casey* as having overturned *Salerno* without a clear mandate from the Supreme Court.[194] However, the majority's reliance on *Manning* as justification for its continued application of

190. *Id.* at 199-201. The dissent pointed to district court findings that suggested that the regulation "requires unnecessary tests [to] be performed, unnecessary staff to be hired, and, in some cases, extensive renovations to existing facilities [to] be made." *Id.* at 199. As a result, according to the dissent, the substantial increase in the cost of an abortion would prevent a significant number of women from obtaining an abortion or, at minimum, delay them from obtaining an abortion, thus resulting in increased health risks to women in South Carolina. *Id.* at 199-200.

191. *Greenville*, 222 F.3d at 159.

192. *Id.* at 164-65.

193. *Id.* at 165-72; *id.* at 197-202 (Hamilton, J., dissenting).

194. *Greenville*, 222 F.3d at 164-65; *see* Manning v. Hunt, 119 F.3d 254, 268 n.4 (4th Cir. 1997).

the *Salerno* standard misinterprets Fourth Circuit precedent by suggesting that the court had no choice but to follow *Manning*'s rejection of *Casey*'s undue-burden standard. Careful examination of *Manning* and other subsequent Fourth Circuit cases involving facial challenges to abortion statutes demonstrates that the *Greenville* court could have followed the overwhelming majority of federal circuits that have chosen to accept *Casey*'s undue burden as the applicable standard.[195]

In *Manning*, the Fourth Circuit applied the *Salerno* standard to a North Carolina abortion provision that required parental or judicial consent for an unemancipated minor's abortion.[196] Expressing its agreement with the Fifth Circuit's reasoning in *Barnes v. Moore*,[197] the *Manning* court claimed that until the Supreme Court specifically overrules *Salerno*, lower courts are bound to apply it.[198] Despite what appears to be a clear mandate on its face, *Manning*'s rejection of *Casey* should not have been interpreted as binding precedent.

First, the *Manning* court itself recognized that it was not being asked to resolve the *Casey/Salerno* debate, because the plaintiffs had not challenged the district court's application of *Salerno*,[199] which leads to the conclusion that *Manning*'s adherence to *Salerno* should be considered dicta. Second, the *Manning* court's rejection of *Casey* becomes even less convincing when one examines its conclusion that the challengers must "show that *under no set of circumstances* can the Act be applied in a manner which is not an *undue burden* on an unemancipated minor's right to obtain an abortion."[200] Rather than an outright rejection of *Casey*, this statement inaccurately combines the *Casey* and *Salerno* language.[201]

In addition, the *Manning* court's discussion of Supreme Court precedent specifically related to judicial bypass methods for uneman-

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195. For a list of circuits that have chosen to follow *Casey* as opposed to *Salerno*, see *supra* note 102.

196. *Manning*, 119 F.3d at 268-69.

197. 970 F.2d 12 (5th Cir. 1992) (per curiam).

198. *Manning*, 119 F.3d at 268 n.4.

199. *Id.* In *Richmond Medical Center for Women v. Gilmore*, the court explained that the *Manning* footnote "does not hold sway here because the issue was conceded and thus it 'was not refined by the fires of adversary presentation.'" 55 F. Supp. 2d 441, 477 n.42 (E.D. Va. 1999) (quoting United States v. Crawley, 837 F.2d 291, 293 (7th Cir. 1988)).

200. *Manning*, 119 F.3d at 269 (emphasis added).

201. *Id.* By combining the standards, the *Manning* court's insistence that *Salerno* remains the governing standard loses its persuasiveness. Similarly, its continued use of the words "undue burden" throughout its due process inquiry suggests that its analysis was largely focused on the approach advocated by *Casey*'s joint opinion. *See id.* ("If the *Bellotti* standards do not address the specific provision, the court then turns to whether the provision is an undue burden on the minor's right to an abortion irrespective of *Bellotti*.").

cipated minors suggests that its decision relied more on the Supreme Court's standard set forth in *Bellotti v. Baird*,[202] rather than on its proper application of the *Salerno* standard.[203] The fact that the court's reasoning centers around demonstrating compliance with *Bellotti*'s specific requirements, rather than demonstrating the statute's constitutionality under the *Salerno* standard, suggests that the court was more concerned with reaching a desired result than applying the proper standard.[204]

Similarly, after *Manning*, a different panel of judges for the Fourth Circuit found that the issue had not been resolved by the *Manning* court. In *Planned Parenthood v. Camblos*,[205] the court upheld a Virginia parental-notice provision, concluding that the provision was constitutional under either the *Salerno* or *Casey* standard.[206] While the majority acknowledged that the *Manning* court had reaffirmed *Salerno*'s applicability in dicta, it chose not to resolve the debate because it was inconsequential to the *Camblos* outcome.[207] However, in a concurring opinion, four judges expressed the view that, because the *Manning* language was merely dicta, the Fourth Circuit should follow the overwhelming majority of its sister circuits in adopting *Casey*'s undue-burden standard.[208] Despite the *Camblos* court's decision not to resolve the issue, its description of the *Manning* language as dicta discredits the *Greenville* majority's reliance on it as binding precedent.

In his dissenting opinion in *Greenville*, Judge Hamilton also agreed with the *Camblos* concurrence that the Fourth Circuit had not definitively resolved the issue.[209] In rejecting the *Manning* dicta, Judge Hamilton recognized that, even though the *Camblos* majority chose not to directly confront *Manning*'s adherence to *Salerno*, its failure to do so did not transform the *Manning* dicta into binding precedent.[210] This criticism by members of the Fourth Circuit makes the *Greenville* majority's claim that it was bound by *Manning* highly questionable.

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202. 443 U.S. 622 (1979).

203. *Manning*, 119 F.3d at 269 (recognizing that abortion statutes related to judicial-bypass methods for minors must only provide the framework for a proper judicial bypass that complies with the requirements established in *Bellotti*).

204. *See infra* notes 226-239 and accompanying text (discussing the potential for manipulation due to the confusion over the applicable standard).

205. 155 F.3d 352 (4th Cir. 1998) (en banc).

206. *Id.* at 359 n.1.

207. *Id.* at 381 n.14.

208. *Id.* at 389 n.2.

209. *Greenville*, 222 F.3d at 195 (Hamilton, J., dissenting) ("However, our circuit never resolved the *Salerno/Casey* question, despite what the majority might have one believe.").

210. *Id.*

Further support for rejecting the majority's adherence to the *Salerno* standard appears in another recent Fourth Circuit abortion decision. In *Richmond Medical Center for Women v. Gilmore*,[211] a Fourth Circuit panel affirmed a district court opinion that explicitly rejected the *Manning* dicta and chose to accept *Casey* as having overruled *Salerno*.[212] The *Gilmore* district court, after conducting an extensive examination of the various circuits' treatment of the issue, chose to follow the majority of circuits that had followed *Casey*. The court explained that because the parties in *Manning* had not asked the Fourth Circuit to resolve the issue, the *Manning* court's dicta did not bind their decision.[213]

In reviewing the district court's opinion, the Fourth Circuit affirmed the lower court's decision without commenting on whether it believed the district court correctly relied on *Casey*.[214] Instead, the appellate court reasoned that the Virginia law was unconstitutional because it lacked an adequate health exception.[215] Although the *Greenville* court did not rely on the *Gilmore* decision because it was before the court at the same time, the fact that *Gilmore* failed to state that it too was bound by *Manning*, weakens the *Greenville* majority's assertion that precedent mandated an application of the *Salerno* standard. If this mandate was as clear as the *Greenville* court suggests, it is curious then that a panel within the same circuit at the same time did not reach the same conclusion as to the applicable standard.

b. The Dissent's Recognition of Stenberg *as Binding Precedent Accurately Reflects* Casey*'s Misplacement of* Salerno.—While the *Greenville* majority's adherence to *Salerno* misinterpreted Fourth Circuit precedent, Judge Hamilton's dissent interpreted Supreme Court precedent as having clearly resolved the *Casey/Salerno* debate in favor of *Casey*'s undue-burden standard in *Stenberg v. Carhart*.[216] Although Judge Hamilton relied in part on the inconsistent language of *Casey* and *Salerno*, his essential justification for applying *Casey* was that the Supreme

211. 224 F.3d 337 (4th Cir. 2000) (per curiam).

212. *Id.*, *aff'g* Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441 (E.D. Va. 1999) (per curiam) (invalidating Virginia's partial-birth abortion statute).

213. 11 F. Supp. 2d 795, 819 & n.27 (E.D. Va. 1998).

214. Richmond Med. Ctr. for Women v. Gilmore, 224 F.3d 337, 339 (4th Cir. 2000) (per curiam).

215. *Id.*

216. *Greenville*, 222 F.3d at 195-96 (Hamilton, J., dissenting) (discussing Stenberg v. Carhart, 530 U.S. 914 (2000)).

Court had definitively resolved the question in its most recent decision.[217]

In *Stenberg*, the Supreme Court held that Nebraska's partial birth abortion statute was unconstitutional.[218] The majority's decision relied on its application of *Casey*'s principles, reasoning that the statute was invalid because of the absence of an exception for the life and health of the mother and because it unduly burdened a woman's right to choose an abortion.[219]

While the majority's analysis did not address the debate between the controlling standards, the various dissents in *Stenberg* focused on the view that *Casey* was not appropriate for reviewing abortion regulations.[220] For example, Chief Justice Rehnquist emphasized his long-standing belief that *Casey* was wrongly decided, but admitted that, according to the rule established in *Marks v. United States*,[221] the *Casey* joint opinion represents the holding of the Court in that case.[222] Similarly, Justice Scalia's dissent expressed his desire to see *Casey* overruled because of his belief that the undue-burden standard is "hopelessly unworkable."[223] Regardless of whether there is merit to either Chief Justice Rehnquist's or Justice Scalia's criticism of *Casey*, their strong campaign against *Casey*'s continued application supports Judge Hamilton's conclusion that *Casey* has, in fact, replaced *Salerno* as the standard for reviewing facial challenges in the abortion context.[224]

In addition to the persuasiveness of the dissent's interpretation of Supreme Court precedent, the fact that the Fourth Circuit is the only federal circuit, other than the Fifth, that has continued to embrace *Salerno* as the applicable standard suggests that the *Greenville* majority could have followed the overwhelming majority of circuits that have chosen to adopt *Casey*'s undue-burden standard even in the absence

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217. *See id.* at 196 (explaining that Supreme Court precedent merely required the court to evaluate the regulation under *Casey*'s undue-burden standard).

218. *Stenberg*, 530 U.S. at 922.

219. *Id.* at 930.

220. *See id.* at 952 (Rehnquist, C.J., dissenting) ("I did not join the joint opinion in *Planned Parenthood v. Casey*, and continue to believe that case is wrongly decided." (citation omitted)); *id.* at 982 (Thomas, J., dissenting) (arguing that "[t]he standard set forth in the *Casey* plurality has no historical or doctrinal pedigree").

221. 430 U.S. 188 (1977).

222. *Stenberg*, 530 U.S. at 952 (Rehnquist, C.J., dissenting).

223. *Id.* at 955 (Scalia, J., dissenting) (quoting his own dissent in *Casey*).

224. This conclusion rests on the notion that the dissenting Justices would not need to demonstrate such strong opposition to the undue-burden standard if the *Casey* joint opinion did not represent the law.

of a clear mandate from the Supreme Court.[225] Thus, Judge Hamilton's refusal to accept the majority's misinterpretation of Fourth Circuit precedent properly recognizes that *Casey* has replaced *Salerno* as the appropriate standard for reviewing facial challenges to abortion regulations.

c. Confusion over the Standard Allows for Manipulation by Courts to Reach Desired Results.—The Supreme Court's unwillingness to explicitly resolve the *Casey/Salerno* debate has allowed the focus of lower court inquiries to shift from the facial constitutionality of challenged state abortion regulations to the court's threshold determination of the appropriate standard for reviewing such challenges.[226] Consequently, the Fourth Circuit's decision in *Greenville,* in which the majority and dissent arrived at different results when examining the South Carolina regulation using *Casey*'s undue-burden standard, demonstrates the negative consequences associated with the Supreme Court's lack of guidance. Allowing courts to apply different reviewing standards provides an opportunity and justification for different judges to reach conflicting outcomes.

Even assuming that the Supreme Court's decision in *Stenberg* can be interpreted as a clear indication that *Casey*'s undue-burden standard has become the law of the land, the Court's fractured decisions in both *Casey* and *Stenberg* have made it impossible for lower courts to determine an appropriate method for applying the new standard.[227] The *Greenville* decision reflects the chaos that has resulted from the Supreme Court's inability to speak with a united voice and illustrates the potential for manipulation and lack of consistency caused by lower courts' confusion over how to apply the undue-burden standard. Without further guidance from the Supreme Court, each court faced with a facial due process challenge to an abortion statute will be able

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225. *See supra* notes 103-106 and accompanying text (explaining that the Fifth Circuit is the only other circuit to demonstrate continued adherence to *Salerno*).

226. *See, e.g.,* Jane L. v. Bangerter, 103 F.3d 1112, 1116 (10th Cir. 1996) (recognizing that "the standard applicable to previability regulations after *Casey* is a matter of some dispute"); Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 529 (8th Cir. 1994) (explaining that "the first question we must decide is whether the district court . . . followed Supreme Court mandate in applying the *Salerno* facial challenge test"); Manning v. Hunt, 119 F.3d 254, 260 (4th Cir. 1994) (mentioning that "there have been very few clear majorities applying any one standard when determining the constitutionality of a state's regulation of abortion").

227. *See* Burdick, *supra* note 42, at 840 (suggesting that the *Casey* joint opinion did not create a practical procedure for applying its standard). Confusion has resulted from courts' attempts to determine what constitutes both an invalid purpose, as well as an impermissible effect. *Id.*

to justify its desired outcome by applying *Casey* in a manner calculated to reach that result.

The *Casey* opinion itself provides little guidance as to how the undue-burden standard should be applied. In attempting to clarify its new standard, the *Casey* joint opinion explained that only a regulation that has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion" will be found to impose an undue burden on that right.[228] The opinion suggested that, for a lower court to determine whether a state regulation had an impermissible purpose or effect, a factual inquiry is required.[229] Such a factual inquiry would examine both the process behind the regulation's creation and the anticipated or actual effects of the regulation on women in the particular state.[230]

However, critics have argued that despite Justice O'Connor's attempts to clarify, the *Casey* joint opinion actually offered little guidance as to how the standard should be applied.[231] First, critics point to the joint opinion's own inconsistent analysis of the five contested Pennsylvania provisions, suggesting that it provided future courts with a poor example.[232] For instance, while Justice O'Connor engaged in a factual inquiry when reviewing the spousal-notification provision, she failed to do so in determining the constitutionality of the informed-consent requirement.[233] This inconsistency has led some courts to apply *Casey* by following its specific holdings, rather than applying the standard to the facts and circumstances of the particular case.[234] Consequently, even where the court agrees on the appropriate standard,

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228. *Casey*, 505 U.S. at 877 (joint opinion of O'Connor, Kennedy & Souter, JJ.).

229. *Id.*

230. *Id.* Justice O'Connor explained:

> A statute with [an impermissible] purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

231. *See* Burdick, *supra* note 42, at 840 (discussing lower courts' confusion over an appropriate method for applying *Casey*).

232. *See id.* at 841 (suggesting that the joint opinion provided no methodology for identifying either an invalid state purpose or an impermissible effect (citing Gillian E. Metzger, Note, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2035 (1994)).

233. *See* Burdick, *supra* note 42, at 841 (citing *Casey*, 505 U.S. at 1484-85).

234. *See, e.g.*, Planned Parenthood v. Miller, 63 F.3d 1452, 1467 (8th Cir. 1995) (upholding an informed consent provision because it was virtually identical to the one upheld in *Casey*).

the existence of conflicting methods for applying the undue-burden standard allows for continued manipulation to reach desired results.

Similarly, the Supreme Court's decision in *Stenberg* did little to clarify the Court's view on the proper approach for conducting an undue-burden inquiry. The *Stenberg* majority's reason for concluding that the Nebraska statute imposed an undue burden on a woman's right to choose an abortion was confined to its claim that "[a]ll those who perform abortion procedures using [the D&E] method must fear prosecution, conviction, and imprisonment."[235] Perhaps recognizing the inadequacy of this justification, both concurring opinions added further support for how the Nebraska statute constituted an undue burden.[236] Alternatively, in their respective dissents, Justices Kennedy and Thomas argued that the majority's failure to accord proper weight to the state's legitimate interest in regulating abortion contradicted one of *Casey*'s basic premises and led to what Justice Thomas called an extraordinary result.[237] Consequently, Justice Scalia's observation that having to determine what constitutes an "undue burden" simply requires each judge to make a value judgment may most accurately reflect the current status of this nation's abortion jurisprudence.[238]

Recognizing that the Supreme Court itself cannot agree on what constitutes an undue burden, each judge on the *Greenville* court was free to choose the approach for applying *Casey* that would justify the outcome consistent with his value judgment on the abortion issue. While the majority's undue-burden inquiry compared Regulation 61-12 and its effects to other abortion regulations the Supreme Court has considered in the past, its analysis was perfunctory, considering that it had previously affirmed *Salerno* as the applicable standard.[239] The dissent, in its attempt to demonstrate why the regulation failed to satisfy

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235. Stenberg v. Carhart, 530 U.S. 914, 945 (2000).

236. *See id.* at 949-50 (O'Connor, J., concurring) (emphasizing that the Nebraska statute bans the most commonly used method for performing pre-viability abortions); *id.* at 952 (Ginsburg, J., concurring) (arguing that an obstacle exists if the statute impedes a woman from choosing the procedure her doctor believes will best protect her).

237. *Id.* at 982-83 (Thomas, J., dissenting).

238. *Id.* at 954 (Scalia, J., dissenting) (declaring that determining whether a statute imposes an undue burden requires judges to make a "value judgment, dependent upon how much one respects (or believes society ought to respect) the life of a partially delivered fetus, and how much one respects (or believes society ought to respect) the freedom of the woman who gave it life to kill").

239. *Greenville*, 222 F.3d at 165. The majority's undue-burden analysis, while giving lip-service to the purpose and effect prong of the *Casey* standard, upheld Regulation 61-12 based on its consistency with Supreme Court precedent other than *Casey*, rather than determining how women in South Carolina would be affected. *Id.* at 105-72.

Casey's undue-burden standard, instead focused on both the purpose and effect of Regulation 61-12 and its consequences for women in South Carolina.[240] Until the Supreme Court determines how an undue-burden analysis should be performed, determinations of the constitutionality of state abortion regulations will continue to reflect the value judgments of members of the judicial branch. Moreover, until the Supreme Court settles the debate over the applicable standard, courts can choose the test that is more likely to accomplish a value-determined end.

5. Conclusion.—The Fourth Circuit's decision in *Greenville* provides a perfect example of the levels of confusion that currently exist regarding this nation's abortion jurisprudence. First, the majority and dissent's disagreement over the applicable standard, specifically whether *Casey*'s undue-burden standard overruled *Salerno*'s "no set of circumstances" test, reflects lower courts' uncertainty as to the Supreme Court's intention. Similarly, the varying approaches followed by the majority and dissent in applying the undue-burden standard to the South Carolina regulation further demonstrates the Supreme Court's lack of guidance in how to resolve these controversial cases. As a result, courts faced with facial challenges to abortion regulations, similar to the Fourth Circuit in *Greenville*, will continue to decide cases based on desired outcomes as determined by that circuit, rather than on the application of appropriate standards.

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240. *Id.* at 197-202 (Hamilton, J., dissenting) (concluding that the detailed requirements are not reasonably related to maternal health and will impose undue burdens such as additional costs and decreased confidentiality).